Supreme Court, U.S.
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In the Supreme Court of the United States

CAROLINE ANNE NEWCOMB, A MINOR,
BY AND THROUGH HER NEXT FRIEND AND
NATURAL FATHER, THOMAS W. NEWCOMB,

Petitioners,

v.

JAMES R. BAIR, M.D., *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Arizona courts deny federal due process to a child severely injured at birth by making the defaults of her attorneys at the summary judgment stage a bar to opening *ex parte* judgments of dismissal, where the trial court was aware of the child's lost representation but did nothing to protect her – not even give notice to her father/guardian?

PARTIES TO THE PROCEEDING

Petitioners are Caroline Anne Newcomb, a minor by and through her next friend and natural father, Thomas W. Newcomb. The Petitioners were Movants in the Superior Court of Arizona, Maricopa County under Rule 60(c)(6), Ariz. R. Civ. P. They were Appellants in the Arizona Court of Appeals, Division One, Department E; and Petitioners for review in the Supreme Court of Arizona.

Respondents, who are medical care providers or medical professionals, were respondents at all stages of the Rule 60(c)(6) proceedings below. They had been defendants in the consolidated actions in the Superior Court of Arizona, Maricopa County, at CV-1992-022705 and CV 1996-007173. Respondents are James R. Bair, M.D.; James R. Bair, M.D., P.C.; Scottsdale Memorial Hospital-Osborn, an Arizona Corporation; Scottsdale Memorial Health Services, Co., Inc., an Arizona corporation; Scottsdale Memorial Hospitals, an Arizona corporation; Scottsdale Memorial Health Systems, Inc., an Arizona company; Scottsdale Medical Imaging, Ltd.; J.K. Crowe, M.D.; B.E. Medley, M.D.; Sharon Lynn Karayianis, M.D., Scottsdale Pathology Associates, Ltd., an Arizona corporation; Judy Finney, M.D., and Heartcare, P.C.

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DECISIONS BELOW

The Ruling of the trial court denying Petitioners' Consolidated Motion to Open and Vacate Judgments Pursuant to Rule 60(c)(6), Ariz. R. Civ.P., [hereinafter "Motion to Open"] is unpublished and appears at App. 34.

The Memorandum Decision of the Court of Appeals of Arizona, Division One, issued on July 11, 2006, appears in the Appendix at App. 3. That Court's denial of reconsideration is an unpublished Order of August 8, 2006 and appears in the App. 33.

The denial of review by the Supreme Court of Arizona is an unpublished Order of January 9, 2007, and appears in the Appendix at App.1.

JURISDICTION

The Court of Appeals of Arizona, Division One, entered its decision on July 11, 2006. A timely motion for reconsideration was denied on August 8, 2006. Petitioners sought discretionary review by the Supreme Court of Arizona in a Petition for Review timely filed on August 23, 2006. The Supreme Court of Arizona denied review on January 9, 2007.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §§ 1257, because the judgment rendered by the Arizona Court of Appeals was that of the highest court in which a decision could be had and because a right is claimed under the Constitution of the United States.

STATUTES AND RULES INVOLVED

Amendment XIV, United States Constitution
§§ 1. Citizenship —— Due process of law —— Equal protection. All persons born or naturalized in the United

States, and subject to the jurisdiction thereof; are citizens of the Unite[illegible]ates and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17(g), Ariz. R. Civ. P.
Rule 17. Parties plaintiff and defendant; capacity.
(g) Infants or incompetent persons. Whenever an infant or incompetent person has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the infant or incompetent may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 60(c), Ariz. R. Civ. P.
Rule 60. Relief from judgment or order.
(c) Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has

been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case presents an important issue involving the federal due process rights and protections owing to injured children who seek compensation for their injuries in state suits during their minority.

In this case, a catastrophically injured child with cerebral palsy suffered *ex parte* judgments with prejudice after her attorneys egregiously defaulted by not responding at the summary judgment stage. The trial court, noting the unexplained absence and unresponsiveness of counsel entered *ex parte* judgments against the child without any inquiry into the obvious breakdown in the child's representation and without so much as simple notice to her out-of-state parent and guardian.

When a post-judgment motion was brought under state rules to open the judgments on miscarriage of justice

grounds, the trial court ruled that all such relief was barred by a state policy against opening any judgments caused by the egregious derelictions ("positive misconduct") of attorneys. Rejecting any affirmative judicial duty to mitigate the sudden loss of the child's representation at a crucial stage, the trial court declined to consider the compelling grounds stated in support of the child's motion to open the *ex parte* judgments under Rule 60(c)(6), Ariz. R.Civ.P.

The Court of Appeals of Arizona affirmed, and the Arizona Supreme Court thereafter declined review.

FACTUAL BACKGROUND

In December 1992, the Newcombs filed suit in the Arizona Superior Court for Maricopa County against Scottsdale Memorial Hospital (hereafter "Hospital") and obstetrician James R. Bair, M.D. The action sought damages for permanent brain damage and cerebral palsy to the infant Caroline Newcomb, and for the death in childbirth of her mother, Cheryl Anne at age 31. At the time suit was filed, the report of the autopsy of Cheryl Anne, as well as other hospital records before and after her death, indicated that the placenta had abrupted during an induced vaginal delivery on January 5, 1991, causing unstoppable bleeding.

Both Dr. Bair and the pathologist obtained by the Hospital to perform the autopsy reported that the deceased mother had fibroid tumors in the upper portion of her uterus (the fundus), but that she had no large fibroids in the lower uterine segment near the birth canal. They also agreed that the placenta was attached in the upper part of the uterus. If those reports were true, there would have been no extraordinary alarm against inducing natural delivery with the drug Pitocin, as Dr. Bair had done.

In 1995, while the case was in the discovery phase, evidence began to surface suggesting that a large fibroid

tumor and possibly the placenta may have been present in the mother's *lower* uterine segment after all. Either of these physical conditions, if present, would have made an induced vaginal delivery dangerous. A large, low fibroid would have limited the space for the baby to pass through the cervix. A low lying placenta, called a "placenta previa," would have been at increased risk of tearing from the pressure of birth, with the added danger that weaker muscles in the lower uterus would not contract strongly enough to stop bleeding from an abruption. **[See *infra* at 16, n9; App. 6-7]**

Despite evidence that the description of the uterus given by Dr. Bair and echoed in the Hospital's 1991 autopsy report were false, the trial court in 1995 granted summary judgment for the Hospital, believing there was no evidence of medical negligence on its part.[1] The court scheduled trial for January 1996 against Dr. Bair alone. As later revealed, Dr. Bair had no insurance.

Unknown to the trial court, Caroline's attorney and the trial attorney for Dr. Bair made a secret deal that the trial would stop short of an actual judgment against Dr. Bair. The purpose of the trial, as later exposed, was to provide a platform for the mounting evidence of altered records, particularly the Hospital's autopsy report, in the hope that the trial court would reinstate the Hospital as a defendant. *See In re Alcorn*, 202 Ariz. 62, 65, 41 P.3d 600 (2002).

Commencing on January 4, 1996, much of the jury trial focused on the medical records that the Newcombs' original counsel claimed had been manufactured. The

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[1] Notably, the trial court in 1995 did not dismiss the prospect that serious fraud had occurred. Instead, it wrote, "[t]he Court has reviewed with considerable care the charges and countercharges about cover-ups and salted records, *all of which suggest acts so egregious that retribution of some type may be appropriate*." (Italics added.) Ruling, Moroney, J., August 1, 1995, No. 187.

evidence included, for example, testimony of a radiology technician based on her records showing a large fibroid in Cheryl Anne's lower uterine segment. Memorandum in Support of Motion to Open, No. 629, Exhibit A at 25. It included testimony from a clerk at the Coroner's Office that a Hospital administrative nurse had reported by phone a diagnosis of "placenta previa," which the clerk recorded on an intake form. *Id.,* Exhibit A at 24. (Placenta previa had not been noted in any of the Hospital's records and had been excluded by the autopsy report.) In addition, there was evidence from a Florida pathologist who, after exhumation of the deceased mother in Florida, examined her uterus and said a large fibroid was in the lower segment. **[See App. at A-23, n16.]**.

On January 22, 1996, trial counsel for the Newcombs suddenly moved for a mistrial. After the court denied the motion, both sides through their counsel moved for dismissal with prejudice. Unaware of the still secret agreement, the trial court granted the dismissal, apparently believing the case had settled. When the trial judge later learned of the undisclosed agreement, however, he opened the case against Dr. Bair and sanctioned and disqualified the attorneys involved in engineering the prohibited pact that had wasted the jury's time.

Thereafter, the case became widely known for the 1996 "sham trial" in which a "fraud on the court" had been committed. Although the revelations of medical facts at trial had been overshadowed by the scandalous misconduct of counsel, there was no finding that the prohibited agreement had any effect on the veracity of the trial witnesses. In the difficult years that followed, the child Caroline came to be represented by two more sets of counsel.

Another suit was added by the Newcombs in 1996 specifically to allege fraud and spoliation arising from altered and concealed records. That action was consolidated

with the original suit. Among several interlocutory appeals, one appeal, which was decided on May 15, 1997, reversed the 1995 summary judgment for the Hospital and restored it as a defendant. **[App. 10, ¶11]**. After a lengthy course of trial rulings and interlocutory appeals, the case was nearing trial once again at the beginning of 2002. By then, a Florida trial attorney and new local counsel from Arizona comprised the third set of attorneys for the child, father and estate of the deceased.[2] Among the remaining active defendants,[3] all but Dr. Bair filed motions seeking summary judgments in their favor in February of 2002. **[App. 42-43]**.

Coincidentally, the Supreme Court of Arizona also issued its famous disciplinary Opinion on January 9, 2002, in *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600 (2002), harkening back to the "sham trial" debacle of 1996. The Hospital's Motion for Summary Judgment in February 2002 expressly reminded the trial court that the Supreme Court of Arizona had just condemned the 1996 sham trial. (Motion, No. 563, at 5-7). The Hospital's motion took lightly the evidence of altered records as if that, too, was a sham, although there had never been any finding rejecting it.

When time came for answering the multiple motions for summary judgment pending in early 2002, the third set of counsel for Caroline suddenly defaulted. The Honorable Rebecca Albrecht took note of their lack of any response and

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[2] The child's father and guardian, Thomas Newcomb, is a party to this Petition as the guardian of his daughter's rights. The present Petition concerns those aspects of the decisions below that pertain to the denial of his daughter Caroline's rights.

[3] These were Dr. Bair; the decedent's prenatal radiologists, J.K. Crowe, M.D. and B.E. Medley, M.D.; their company, Scottsdale Medical Imaging, LTD.; the Hospital,; the pathologist, Sharon Lynn Karayianis, M.D., who performed the autopsy for the Hospital; and her company Scottsdale Pathology Associates, LTD.

canceled the oral argument previously scheduled for those motions. **[App. at 41]** (Minute Entry, March 28, 2002).

In April, 2002, the trial court per Judge Albrecht ruled on the motions in the conspicuous and still unexplained absence of legal representation for the child Caroline. In the Minute Entry of April 8, 2002, the court specifically reiterated on the record that **"[t]o none of these motions has a response been filed. . . . The time to respond has passed by 30 days . . .."** (Emphasis added). **[App. 43]**.Without inquiry to explain the desertion b · the child's counsel, without simple mailed notice to the child's father in Pennsylvania (where he lived with Caroline and her maternal grandmother), and without any step to protect in any way the child's interests in representation for her causes of action, the court proceeded to rule on the merits *ex parte* for all the moving defendants.

In that non-adversarial context, Judge Albrecht evidently rejected as irrelevant the1997 affidavit of a Johns Hopkins Professor of Pathology, Grover MacGregor Hutchins, M.D., who took issue with the Hospital's autopsy report **[App. 50]** (Affidavit); **[App. 45-46]** (minute entry). The affidavit expressed Dr. Hutchins' finding, after personally examining the mother's exhumed uterus, that there was indeed a large fibroid tumor in the lower uterine segment. It recited that an obstetrical colleague examined prenatal ultrasounds of Cheryl Anne Newcomb and also saw the placenta low in her uterus. This affidavit of a noted teaching pathologist at a renowned institution was flatly irreconcilable with the findings in the Hospital's autopsy report.

Judge Albrecht was evidently persuaded in *ex parte* proceedings that the factual disagreement was "opinion" that could never be considered evidence of fraud. Likewise, the court gave the affidavit no relevance to any other medical issues in the case – not even to the claims of the

radiologists' negligence in not giving better warning to Dr. Bair of the low position of the fibroid and placenta.**[See App. 44-45]** Consequently, on April 8, 2002, the court dismissed *ex parte* and with prejudice the fraud claims in the 1996 suit and all the cumulative claims and theories of medical negligence against the defendants who moved for summary judgment.

On August 6, 2003, noting the additional abandonment of an unperfected appeal on behalf of Plaintiffs and the absence of any other activity, Judge Albrecht entered *sua sponte* a signed judgment dismissing all remaining claims of the plaintiffs, including those personal to the child Caroline. The docket of the Superior Court of Arizona, Maricopa County, shows the following entry for August 13, 2003 – "Case Dismissed-Full." That had the effect of finally terminating the claim against the obstetrician Dr. Bair who had not been granted summary judgment in 2002. As with the 2002 judgments, no notice of this *sua sponte* Order was given to Thomas Newcomb, Caroline's father and guardian.

Thomas Newcomb discovered that the case had been dismissed only after he found the reference "dismissed-full" on an internet search of the docket. Memorandum in Support of Motion to Open, No. 629, Exhibit G. He was then forced to start over and find new counsel to help him reconstruct and evaluate the massive and complex file. In November 2004, on behalf of himself and his daughter, he filed a Consolidated Motion of Plaintiffs to Open and Vacate Judgments Pursuant to Rule 60(c)(6), Ariz.R.Civ.P. That motion to open set forth an extensive factual analysis of the twelve-year-long record amplified by renewed supporting medical opinion and sought relief from the *ex parte* judgments, especially those against the child.

The motion came before Judge Albrecht, who denied

it on March 14, 2005 after full briefing and argument.[4] **[App. 34-37]** Judge Albrecht's sole reason for the denial was that the motion – even in respect to the disabled child – was precluded by a *per se* bar against Rule 60 motions in cases where the challenged judgments had resulted from positive misconduct by attorneys for the movants. The rationale for the rule, which was drawn from *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000), was that counsel should not be encouraged to abandon clients in order to seed the record with grounds for later opening judgment and starting fresh.[5]

A notice of appeal from Judge Albrecht's final ruling was timely filed in the Arizona Court of Appeals, Division One. On July 11, 2006, after briefing and oral argument, the Court of Appeals affirmed the denial of relief in a Memorandum Decision. **[App. 3-29]**

The Newcombs' Motion for Reconsideration in the Court of Appeals was denied on August 8, 2006. **[App. 33** A Petition for Review was thereafter timely filed on August 23, 2006 in the Arizona Supreme Court, which on January 9, 2007, without opinion, denied allowance of review. **[App. 1]**

STATEMENT OF PROCEEDINGS BELOW

The federal substantive and procedural due process challenge, including the issue of the minimum requirement of notice, was raised to the trial court, *inter alia,* in the Memorandum in Support of Motion to Open. See

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[4] Extensions of time had been requested and granted to defendants to address the lengthy and comprehensive Motion.

[5] Before an appeal could be taken from Judge Albrecht's denial of Rule 60 relief, a separate appeal had to be taken to direct her to sign a form of Order needed to make her ruling final and appealable under Arizona law.

Memorandum at 39-40, No. 629. It was also raised by Petitioners' in the oral argument on Feb. 25, 2005, wherein it was argued, for example: "Your Honor, it is our submission that not only does Rule 17(g) require affirmative protection of the child, but likewise the due process clause, which Rule 17 is really driven by, both federally and under Arizona law." [Tr. of Oral Argument at 11, Exhibit 2, Appendix of Appellants, CA-CV 05-0569].

The Fourteenth Amendment issue was raised in the Brief of the Appellants in the Arizona Court of Appeals, Division One, in Argument heading "A," Brief at 22, and at 33-34, 38. The issue was again raised in the Motion for Reconsideration before the Court of Appeals on July 26, 2006, at 4-7. Thereafter, federal due process was addressed in the Petition for Review before the Arizona Supreme Court filed on August 23, 2006, in the second, third and fourth Questions Presented and in text. *See id.* at 1, 2 & 10.

REASONS FOR GRANTING THE WRIT

IN BARRING RELIEF FROM *EX PARTE* JUDGMENTS ENTERED AGAINST A DISABLED CHILD AFTER EGREGIOUS DEFAULTS BY HER ATTORNEYS, AND IN DISAVOWING ANY JUDICIAL DUTY TOWARD HER, THE ARIZONA COURTS HAVE CALLED ATTENTION TO THE NEED FOR THIS COURT'S GUIDANCE ON THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS OF CHILDREN

Arizona has historically been at the forefront in engendering legal protections for children. This is seen not only in its humanistic regard for Rule 17(g), Ariz.R.Civ.P., but also in its distinguished judicial precedents defining a child's rights in fundamental and constitutional terms. So strong was the network of protection for children that in

Barrio v. San Miguel Division Hospital, 143 Ariz. 101, 692 P.2d 280 (1984), the Arizona Supreme Court struck down legislation that would have let the statute of limitations for medical malpractice run against children during minority. It did so because the inherent dependency and vulnerability of children precluded that intrusion as a "violation of the fundamental constitutional right guaranteed by article 18, §§ 6 [Ariz. Const.]," which protects rights of action from "abrogation." *Id.*, 143 Ariz. 107.[6]

Most directly, the heralded case of *Byers-Watts v. Parker*, 199 Ariz. 466, 18 P.3d 1265 (App. 2001), underscored the right of a minor to have the representation of an attorney under Rule 17(g), Ariz.R.Civ.P. There an attorney had filed a personal injury suit for a child, but later withdrew. The trial court gave the child's parent the chance to obtain new legal representation. Failing to do so after a reasonable time, the parent sought to go forward in the case without counsel. In response, the trial court dismissed the case in mid-course without prejudice, saving for the minor the right to sue upon reaching majority.

In affirming, the Court of Appeals in *Byers-Watts* adopted the federal view expressed in *Wenger v. Canastoga Cent. School Dist.*, 146 F.23d 123, 125 (2d Cir. 1998), under identical Rule 17(c), F.R.Civ.P., and prevented a minor's action from going forward without legal representation because "`[t]he infant is always the ward of every court wherein his rights or property are brought into jeopardy'" (quoting *Johns v. County of San Diego*, 114 F.3d 874, 877

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[6] *Barrio* was later complemented by *Porter v. Triad of Arizona*, 203 Ariz. 230, 52 P.3d 799 (App. 2002), holding that a two-year statute of limitations governing wrongful death actions could not run against a child beneficiary until the child reached majority.

(9th Cir. 1997)).[7]

The *Byers-Watts* ruling itself was widely regarded as making legal representation a condition for maintaining a child's cause of action.[8] It left little room or rationale for splitting hairs. Indeed, a recent Connecticut case cited *Byers-Watts* as a leading case establishing the procedural rule generally accepted by other jurisdictions. *Lowe v. Shelton*, 83 Conn. App. 750, 756-57, 851 A.2d 1183 (2004).

Despite this highly protective legal framework, Judge Albrecht of the Superior Court of Arizona entered *ex parte* judgments with prejudice in 2002 and 2003 against Caroline Newcomb although well aware of the unexplained breakdown in the child's legal representation. Moreover, the court did so without the slightest inquiry of any kind into the circumstances of the attorneys' glaring defaults; without providing any notice to the child's Pennsylvania father and guardian about the attorneys' sudden disappearance; and without so much as considering the possibility of appointing new counsel or dismissing the case against the child without prejudice, as was done in *Byers-Watts*. Literally without doing anything that might mitigate the child's sudden unexplained loss of representation after a decade of

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[7] Rule 55(b), Ariz.R.Civ.P., also, requires that advance notice of any default against a child be given directly to the guardian. *See, e.g., Hutton v. Fisher*, 359 F.2d 913, 915 (3d Cir. 1966)(applying the identical federal Rule 55(b)).

[8] *Arizona Civil Remedies* § 3.5.1.8 at 3-20 (2d ed. 2003), for example, described *Byers-Watts* as expressing "a mandate for minors to have legal counsel . . .." *See Byers-Watts v. Parker*, 199 Ariz. 466, 470, 18 P.3d 1265, 1269 (App. 2001).

Byers-Watts must also be viewed in the prior light of *Gomez v. Maricopa County*, 175 Ariz. 469, 857 P.2d 1323 (App. 1993)(for their special protection, minors may repudiate any compromise not made by a legally authorized guardian).

litigation, Judge Albrecht in 2002 and 2003 did the opposite of what *Byers-Watts* appeared clearly to require by dismissing the unrepresented child's case *ex parte* and with prejudice during the child's minority.

In November of 2004, the Newcombs through new counsel filed a comprehensive post-judgment motion under Rule 60(c)(6), Ariz.R.Civ.P. The motion set forth factual and legal circumstances – including the evidence of fraudulently altered records left unresolved by findings – demonstrating that a miscarriage of justice had been done, particularly to the child. In March 2005, however, Judge Albrecht held that the Supreme Court of Arizona's decision in *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000), barred her from granting any relief.

In *Panzino* the state Supreme Court had refused to entertain a motion to open a judgment that was entered against an adult plaintiff after her attorney abandoned the case. The Court's rationale was twofold – that the trial court had no independent duty to oversee the plaintiff's relationship with her attorney-agent, and that opening judgments resulting from the attorney's positive misconduct would encourage expansion of such egregious behavior as a backdoor means to manufacture fresh starts. By extending *Panzino* to a ward of the court whose minority and incompetency demanded affirmative judicial vigilance, however, Judge Albrecht took *Panzino* to a new and disturbing level in violation of the due process requirements of the Fourteenth Amendment.

In response to the argument that the court itself had known of the mysterious breakdown in legal representation early in 2002 but still did nothing to fulfill its duty to inquire into its cause or alleviate it, Judge Albrecht countered that there was no affirmative judicial duty to do anything to assure that the child's actual representation. In her Ruling of March 16, 2005, Judge Albrecht wrote:

> The outcome is not changed because the person on whose behalf the motion is brought is a minor. This case was brought on the child's behalf by her father and next friend, Thomas Newcomb. Mr. Newcomb and Caroline were represented by counsel; **Mr. Newcomb was not attempting to represent his daughter, something that is precluded by Arizona law**. The discussion of the tolling of the statute of limitations for the minority of the Plaintiff does not forward the Plaintiffs' argument here.
>
> . . . This case though demonstrates most clearly the wisdom of the court's ruling, here with a minor child involved who cannot understand for herself what is happening, **the attorneys representing her have indeed "expand(ed) their egregiousness." [App. 36-37]**[Emphasis added].

The Newcombs had argued that *Panzino's* bar to post-judgment challenges had no applicability to the case of a child because the court possessed an independent duty to take measures to protect a child from abandonment by her counsel. E.g., Tr. of Oral Argument at 11, 19, Exhibit 2, Appendix of Appellants, CA-CV 05-0569. Such an exercise of judicial supervision, in turn, would prevent *ex parte* judgments from ever being entered absent inquiry, correction or, at least, notice to the guardian. The Newcombs thus asserted that the judgments entered by the trial court against Caroline were in breach of the court's own duty, unlike the circumstance involving an adult plaintiff in *Panzino*.

Because Judge Albrecht barred consideration of the Rule 60(c)(6) motion due to the egregious positive misconduct of counsel, she therefore had no occasion to evaluate the compelling facts that showed her *ex parte* judgments were a gross miscarriage of justice. Accordingly, the court did not address, for instance, Dr. Hutchins'

affidavit that he personally found a large fibroid in the lower uterine segment, a fact pivotal to both the medical negligence and fraud claims of the child. Nor did the court address an opinion of obstetrical expert Cynthia Cooke, M.D., submitted for the first time with the Rule 60 motion, that gave compelling support to the merits of the negligence and fraud claims that had been dismissed *ex parte*.[9] Because Judge Albrecht determined that counsels' defaults in 2002 and 2003 "expanded their egregiousness" and that the court had no affirmative duty to its ward on the subject of legal representation, she made no findings or observations at all

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[9] Cynthia Cooke, M.D., is a board certified obstetrician and a former Clinical Assistant Professor at the University of Pennsylvania School of Medicine. In 1991, based on the *originally produced records*, she opined there had been no medical malpractice. A decade later, however, Dr. Cooke was asked to revisit the case. After reviewing the new evidence and records, she emphatically expressed the opposite view, noting the import of what had previously been concealed:

> [O]ne thing is certain: The two large fibroids could not be in the right cornual region of the fundus and yet be in the lower uterine segment of the exhumed uterus. Again, **this is not a matter of mere opinion; rather, it is a matter of hard fact**, now established by the exhumation autopsy and the preserved uterus. I can reach no other conclusion than that Dr. Karayianis' autopsy report was falsified, as were Dr. Bair's progress notes, as to the location of the two large fibroids, as well as the implantation site of the placenta.
>
> The physical evidence now establishes that at the time of baby Caroline's delivery as well as at all times during the pregnancy, Cheryl Newcomb's placenta was covering the large fibroid, or fibroids, occupying the lower uterine segment. This was an absolute catastrophe waiting to happen, and which was completely preventable with a primary c-section, which was the standard of care in 1990-1991 under these circumstances. [Memorandum in Support of Motion to Open, No. 629, Ex. A at 27 (emphasis added)].

bearing upon the underlying claims of fraud and medical negligence.[10]

The Court of Appeals, in affirming the Superior Court's March 14, 2006 decision, embraced Judge Albrecht's holding that the trial court had no duty at all to protect the child from the major defaults of her attorneys and that the bar of *Panzino* applied equally to children and adults. **[App. 18-20]** The Court of Appeals, however, chose additionally to address the "fraud on the court" component of the Newcombs' Rule 60 motion, a subject which Judge Albrecht had neither reached nor mentioned.[11] In rejecting the "fraud on the court" challenge, the Court of Appeals did not dispute that evidence existed showing that records had been fraudulently altered and hidden to sabotage the child's action. Instead, it determined that the case did not warrant the "fraud on the court" mantle because no attempt to

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[10] There can be little doubt now that the summary judgments granted for moving defendants in 2002 by Judge Albrecht were unsustainable on the merits. Dr. Hutchins' physical observations of a large fibroid low in the uterus directly contradicted statements of Dr. Bair and the Hospital's pathologist that there was no fibroid there. The tumor observed by Dr. Hutchins was large and its presence was corroborated by prenatal ultrasounds that were not among the medical records Dr. Bair initially produced. The Memorandum in Support of the Motion to Open, No. 629, at 21-24, had urged that the court in 2002 had misjudged Dr. Hutchins' Affidavit. The March 2005 Ruling was silent on this matter. **[App. 34-37]**

[11] This may impliedly have been because, among the grounds that may be raised in challenging a judgment as manifestly unjust, a "fraud on the court" can never be deemed forfeited, *see, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)("[T]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.")

influence or bribe the court had been alleged and because the allegations and supporting evidence of fraud were already known to the court when the *ex parte* judgments were entered. The Court of Appeals surmised that raising the evidence of "fraud on the court" to the court's attention had dispelled any true "fraud on the court," even without a full and fair fact finding. **[App. 25 ¶46, 27 ¶48]**.

In declaring the *ex parte* judgments entered against the child were not really "fraud on the court" challenges, the Court of Appeals had no occasion to carve out an exception to the broad *Panzino* bar applied by the trial court. Labeling aside, however, the Court of Appeals decided it was sounder policy to give finality to those who sought the *ex parte* dispositions against an unrepresented child than to consider the child's Motion to Open to resolve the dangling evidence of fraud that may have contaminated the child's case from the outset.[12]

The course taken by Arizona in this case represents a flight from the most deeply embedded elements of justice and federal due process by cutting off traditional equity precisely at a point where its full consideration is most acutely needed. Due attention to the merits of the motion to open judgments was required to prevent an innocent and severely disabled minor from eventually becoming a ward of society because she lacked representation and a full and fair

---

[12] Had no evidence been concealed or altered, there would have been no occasion for the "sham trial" which, together with all its consequences, proved so disruptive to all, including the child. The affidavit of noted Johns Hopkins School of Medicine Professor Grover Hutchins was not obtained until 1997. At no time were the facts concerning the alleged salting of records ever the subject of direct fact findings.

adversarial fact-finding on issues that remain haunting.[13]

Minimum due process as well as the "good order of society" referred to in *Hazel-Atlas*, 322 U.S. at 246, require that a child be given some kind of affirmative judicial protection from abandonment by counsel. At the very least, notice was required that would have alerted the child's father to the absence of egregiously delinquent counsel who were entrusted as officers of the court to pursue the case far from their Pennsylvania domicile.[14]

This Honorable Court recently held in *Jones v. Flowers*, 547 U.S. 220 (2006), where the taking of a home for taxes was at stake, that the concept of "reasonable notice" required attentiveness to the circumstances and not passivity. This Court stated:

> [W]e conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.
>
> * * * * *
>
> In this case, the State is exerting extraordinary

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[13] The defendants could hardly have expected absolute finality for judgments that they had urged the Superior Court to enter *ex parte* against a child they knew was without the aid of legal representation.

[14] Even in cases in which the plaintiffs are all adults, some federal Courts of Appeals have required direct notice to a party before that party's case may be dismissed due to an attorney's lapse. *E.g., Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126, 129 (3d Cir. 1987). More flexibly, the Second Circuit has "encourage[d] district judges to give notice directly to the [adult] client where there is reason to suspect that attorney incompetence is about to sink a client's case, **so that the litigant may attempt to remedy the situation**." *Dodson v. Runyon*, 86 F.3d 37, 40 n.4 (2d Cir. 1996)(vacating "severe penalty" of dismissal for non-prosecution)(emphasis added).

> power against a property owner – taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed. [Slip Op. at 17]

Weighing the importance of compensation to a permanently brain damaged and disabled child far exceeds even the great importance which the Court in *Jones* attached to the seizure of a home. Moreover, any act of giving notice only to attorneys who have already demonstrated that they do not appear or respond is a futility.

As observed by this Honorable Court in *Troxel v. Granville*, 530 U.S. 57, 65 (2000), a case relating to a state's handling of a parent's child custody rights:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720, 117 S.Ct. 2258; see also *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

The present case exposes the great peril in permitting the protection of minors to be expressed insecurely as a product of Rule 17's architecture without direct reference to the Fourteenth Amendment due process standards that guard against imputed forfeitures by children.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant her Petition for a writ of certiorari to the Court of Appeals of Arizona, Division One, and afford plenary review.

Respectfully submitted,

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Above counsel is a member in good standing of the Supreme Court of the United States.

Dated: March 30, 2007

APPENDIX

SUPREME COURT
STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

NOEL K. DESSAINT
CHIEF DEPUTY CLERK

KATHLEEN E. KEMPLEY
CLERK OF THE COURT

January 9, 2007

RE: NEWCOMB et al v JAMES BAIR/SCOTTSDALE HEALTH et al
Arizona Supreme Court No. CV-06-0294-PR
Court of Appeals Division One No. 1 CA-CV 05-0569
Maricopa County Superior Court Nos. CV1992-022705 and CV1996-007173 (Consolidated)

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 9, 2007, in regard to the above-referenced cause:

ORDERED: Petition for Review of Appellants = DENIED.

Chief Justice McGregor did not participate in the determination of this matter.

Record returned to the Court of Appeals, Division One,

Phoenix, this 9th day of January, 2007.

Noel K Dessaint, Clerk

TO:
J Tyrrell Taber, Taber & Commerford Attorneys at Law
William P Murphy, Law Office of William P Murphy Esq
K Layne Morrill, Morrill & Aronson PLC
Stephen C Yost and Martin P Clare, Campbell Yost Clare & Norell PC
Frederick M Cummings and John J Egbert, Jennings Strouss & Salmon PLC
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Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CAROLINE ANNE NEWCOMB, by and through her her next friend and natural father THOMAS W. NEWCOMB; THOMAS W. NEWCOMB, as natural parent of CAROLINE ANNE NEWCOMB; THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB,deceased, on his own behalf and for and on behalf of CAROLINE ANNE NEWCOMB,	1 CA-CV 05-0569 DEPARTMENT E MEMORANDUM DECISION (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
Plaintiffs/Appellants,	
v.	
JAMES R. BAIR, M.D.; JAMES R. BAIR, M.D., P.C., SCOTTSDALE MEMORIAL HEALTH SERVICES, d/b/a SCOTTSDALE MEMORIAL HOSPITAL-OSBORN, an Arizona corporation,	
Defendants/Appellees.	
==========	
CAROLINE ANNE NEWCOMB, a minor, by and through her next friend and	

natural father THOMAS W. NEWCOMB; THOMAS W. NEWCOMB, as natural parent of CAROLINE ANNE NEWCOMB; THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB, deceased, on his own behalf and for and on behalf of CAROLYN ANNE NEWCOMB,

Plaintiffs/Appellants,

v.

SCOTTSDALE MEMORIAL HEALTH SERVICES, CO., INC., an Arizona corporation; SCOTTSDALE MEMORIAL HOSPITALS, an Arizona corporation; SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC., an Arizona company; SCOTTSDALE MEDICAL IMAGING, LTD., an Arizona company; J.K. CROWE, M.D.; B.E. MEDLEY, M.D.; SHARON LYNN KARAYIANIS, M.D.; SCOTTSDALE PATHOLOGY ASSOCIATES, LTD., an Arizona corporation; JAMES R. BAIR, M.D., P.C.; JAMES R. BAIR, M . D.; JUDY FINNEY, M . D. ; HEARTCARE, P.C., an Arizona corporation,

Defendants/Appellees.

Appeal from the Superior Court in Maricopa County
Cause Nos. CV 1992-022705, CV 1996-007173
(Consolidated)

The Honorable Rebecca A. Albrecht, Judge (Retired)

AFFIRMED

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Murphy & Goldstein, P.C. Philadelphia, Pennsylvania
By William P. Murphy
Morrill & Aronson, PLC Phoenix
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Michael C. Johnson, P.C. Phoenix

By Michael C. Johnson
Attorneys for Defendants/Appellees Heartcare, P.C. and Judy Finney, M.D.

N O R R I S, Judge

¶1 This case arises out of the birth of Caroline Newcomb ("Daughter").Cheryl Newcomb ("Mother") died after giving birth to Daughter and Daughter was born wi th severe brain damage. Represented by counsel, Plaintiff/Appellant Thomas Newcomb ("Father"), Mother's husband and Daughter's father, sued several health care providers and others asserting claims arising out of or related to Mother's death and Daughter's injury.

¶2 The superior court granted summary judgment against Father and Daughter (collectively"Newcombs"). Subsequently, Newcombs unsuccessfully moved to vacate the judgments under Arizona Rule of Civil Procedure 60(c) (6) ("Rule 60(c) (6)") On appeal, Newcombs argue first, Daughter was abandoned by counsel and the superlor court, knowing of thc abandonment, owed a duty to ensure actual legal representation of Daughter because she was a minor; and second, Defendants/Appellees perpetrated fraud upon the court. While we are sympathetic to the suffering experienced by Father and Daughter, based on controlling Arizona case law and the record before us, we are required to affirm.

FACTUAL AND PROCEDURAL HISTORY

¶3 On January 5, 1991, at approximately 7:30 a.m., Mother entered Defendant/Appellee Scottsdale Memorial Hospital ("Hospital") for the planned induction of labor and

vaginal delivery of her first child. Defendant/Appellee James Bair, M. D. was Mother' s obstetrician and the primary doctor in the delivery. At approximately 8:41 a.m., Dr. Bair ruptured Mother's membranes, commonly known as breaking of the water bag; within minutes, Mother became short of breath and began to panic. Because of these complications, Dr. Bair called cardiologist Judy Finney, M.D. for a cardiac consultation.[1] During Dr. Finney's consultation, Mother began bleeding profusely.

¶4 Accordingly, Dr. Bair ordered an emergency cesarean section ("c-section"). Dennis Weiland, M.D., a general surgeon, Joseph Gossett, M.D., an anesthesiologist, and Robert Nelson, M.D., an obstetrician, were present during the c-section.[2] Daughter was delivered at around 9:33 ultimately sustaining permanent brain damage. After delivery, Mother was cared for by Dr. Finney, Dr. Weiland, Dr. Gossett, and Dr. Nelson, and, at 10:55 a.m., was taken into the intensive care unit. Despite the doctors' resuscitative efforts, Mother died. Pathologist Sharon Karayianis, M.D.[3] conducted an autopsy on Mother and concluded that she had died from amniotic fluid embolism ("AFE").[4] We note that

---

[1] Dr. Finney was not an employee of the Hospital. Her employer was Heartcare, P.C., which, along with Dr. Finney, is a Defendant/Appellee in this appeal.

[2] Dr. Gossett and Dr. Nelson are not Defendants/Appellees in this appeal.

[3] At that time, Dr. Karayianis was employed by Scottsdale Pathology Associates, an entity distinct from the Hospital. Dr. Karayianis and her employer are Defendants/Appellees in this appeal. When used collectively, Dr. Karayianis and Scottsdale Pathology Associates will be referred to as "Karayianis."

[4] AFE is an unpredictable, rare, and usually-deadly affliction.

two other doctors were involved in Mother's pregnancy, J.K. Crowe, M.D. and B.E. Medley, M.D. Both are diagnostic radiologists, who, during her pregnancy, worked for Scottsdale Medical Imaging, Ltd ("SMI") . Each evaluated an ultrasound of Mother.

¶5 On December 31, 1992, Newcombs sued the Hospital, Dr. Bair and his professional corporation (collectively "Bair"), and unnamed Doe defendants. The complaint alleged one count for wrongful death of Mother and one count for personal injuries inflicted on Daughter against the Hospital and Bair. We refer to this first complaint as *Newcomb I.*

¶6 Before the close of discovery, Newcombs' counsel began to suggest certain individuals involved in the case had fraudulently altered or tampered with Mother's medical records to make it appear she had died from AFE instead of from the "real reason" for her death, an undiagnosed placenta previa. Placenta previa occurs when the placenta, the afterbirth, is malpositioned and located toward the bottom of the womb, thus blocking all or part of the opening of the birth canal. Asserting the placenta as well as fibroids, large benign tumors, in Mother's womb had obstructed the birth canal, Newcombs claimed Dr. Bair never should have induced vaginal labor, but instead should have attempted a primary c-section delivery. The defendants denied any cover-up and asserted Mother had died from AFE.

¶7 The Hospital moved for summary judgment. Newcombs conceded Dr. Bair was not the Hospital's agent for purposes of vicarious liability, and the superior court granted the Hospital summary judgment on vicarious liability. Newcombs never appealed this ruling. The court also granted the Hospital summary judgment on its own independent medical negligence, finding Newcombs had failed to establish the Hospital, through the actions of its nurses who had assisted in the delivery, had "caused any

injury to the Plaintiffs." Acknowledging Newcombs had opposed summary judgment "by alleging that they [had] discovered new and previously undisclosed evidence that Hospital personnel participated in a falsification of some records and a redraft of others," the court considered "the charges and countercharges about cover-ups and salted records," but, nevertheless, failed to "find any evidence that what was covered up or salted would have established liability as claimed in the Complaint on the part of the Hospital." This left Bair as the only defendant in the case. Newcombs filed a motion for new trial regarding summary judgment.

¶8 Trial proceeded against Bair in early January 1996, and lasted nine days. As discussed in *In re Alcorn*, 202 Ariz. 62, 68 n.8, ¶ 20, 41 P.3d 600, 606 n.8 (2002), and *Hmielewski v. Maricopa County*, 192 Ariz. 1, 2, ¶ 1, 960 P. 2d 47, 48 (App. 1997), the trial was a "sham." Essentially, Bair and Newcombs, through counsel, agreed to release Bair from any liability for Dr. Bair's alleged malpractice but to proceed with the trial in the hope of "educating" the trial judge as to the Hospital's culpability, which Newcombs' attorneys hoped would cause the trial judge to reconsider his summary judgment ruling in favor of the Hospital. *See Alcorn*, 202 Ariz. at 65, ¶ 12, 41 P.3d at 603; *Hmielewski*, 192 Ariz. at 5, ¶ 20, 960 P.2d at 51.

¶ 9 The superior court discovered the sham on February 12, 1996. Two days later, it denied Newcombs' motion for new trial, which Newcombs appealed. While the court was gathering more information regarding the sham, on April 24, 1996, Newcombs' counsel, Timothy Hmielewski and Rodney Johnson, filed a new lawsuit on Newcombs' behalf, *Newcomb II*.[5] In this case, Newcombs asserted

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[5] Because of their participation in the scheme, the court revoked Hmielewski' s *pro hac vice* status and sanctioned Hmielewski along with

medical malpractice and fraud claims against a host of defendants, including the Hospital and five of its nurses; Dr. Crowe, Dr. Medley, and their employer, SMI; Karayianis; Dr. Nelson and his corporation; Dr. Gossett and his corporation; Dr. Finney and her employer, Heartcare; and Dr. Weiland and his corporation.

¶ 10 On September 4, 1996, the Hospital moved to dismiss the *Newcomb II* claims against it. Dr. Weiland also moved to dismiss.[6] The superior court granted the Hospital's motion to dismiss on *res judicata* grounds, dismissed *Newcomb II* claims against the individual Hospital nurses because Newcombs had failed to timely serve them, and granted Dr. Weiland's motion to dismiss as well. Newcombs appealed the judgments in favor of the Hospital and Dr. Weiland, but not the nurses.

¶ 11 While Newcombs' appeal in Newcomb II was pending, on May 15, 1997, in a memorandum decision, this court reversed the superior court's grant of summary judgment to the Hospital in Newcomb I. *Newcomb v. Scottsdale Mem' l Health Servs., Inc.*, 1 CA-CV 96-0378 (Ariz. App. May 15, 1997) (mem. decision). We held Newcombs had presented sufficient expert witness evidence regarding the negligence of the nurses to establish a prima facie case of hospital negligence.

¶12 After reversal, in October 1997, Newcombs filed a motion to consolidate *Newcomb I* and *Newcomb II.*

Johnson and Bair' s counsel. In August 1996, Newcombs obtained new counsel, the firm of Leonard and Clancy.

[6] In *Newcomb II*, Newcombs sued Dr. Weiland for wrongful death/medical malpractice, asserting Dr. Weiland should have performed a hysterectomy after delivery. Newcombs also asserted a fraud claim against Dr. Weiland, alleging he and others had altered medical records and evidence. Newcombs did not assert any claims against Dr. Weiland for injuries to Daughter.

Consolidation was granted in February 1998.

¶13 On September 15, 1998, in a memorandum decision, we reversed summary judgment in favor of the Hospital in *Newcomb II*, concluding that our decision in *Newcomb I* eliminated any *res judicata* effect. *Newcomb v. Scottsdale Mem'l Hospitals*, 1 CA-CV 97-0320, 1 CA-CV 97-0522 (consolidated) (Ariz. App. Sep. 15, 1998) (mem. decision). We affirmed, however, summary judgment in favor of Dr. Weiland, holding the wrongful death/medical malpractice claim time-barred and the fraud claim unsupported by the evidence.

¶14 The case once again returned to the superior court. After subsequent amendments to the complaint, the defendants in the case consisted of the Hospital, Bair, Karayianis, Dr. Crowe and SMI, and Dr. Medley.

¶15 As the case progressed, Karayianis sent Newcombs a request for admissions. One of the admissions requested Newcombs "[a]dmit that plaintiffs have sustained no expense in the prosecuting in [*Newcomb I and II*] as the result of anything Dr. Karayianis did nor did not do." Newcombs denied that admission. Karayianis then propounded interrogatories relating to the request for admissions. On January 3, 2001, Father responded to the interrogatories, and explained his denial to the requested admission in a signed, seven-page narrative.[7] Father' s narrative included a summary of various conversations he had had with his lawyers, including Hmielewski.

¶16 Asserting Newcombs had waived the attorney-client privilege by discussing Father's conversations with former counsel in the narrative, defendants moved to

---

[7] At this time, Leonard and Clancy still represented Newcombs, but it subsequently withdrew as counsel of record; in April 2001, in-state counsel Timothy Forshey and out-of-state and lead counsel Peter Mineo began to represent Newcombs.

compel Newcombs to produce their former attorneys' files to show the increased litigation expenses resulting from the alleged fraud. Newcombs objected to producing the files. At about the same time, defendants also moved to strike Newcombs' duplicative experts, claiming that Newcombs had listed five experts, including Grover Hutchins, M.D., Ronald Wright, M.D. and Cynthia Cooke, M.D., who would all testify about the same thing: Dr. Karayianis's autopsy findings and how she had misrepresented them.

¶17 On November 16, 2001, by minute entry, the superior court granted the motion to compel and ordered Newcombs to produce their former attorneys' files to defendants by no later than December 7, 2001. The court also granted the motion to strike the duplicative experts, agreeing that the experts' "areas upon which they will be called to testify are the same" and ordering Newcombs to choose one expert "one expert ruling") . In the same minute entry, the court set a February 1, 2002 deadline for the filing of all dispositive motions. Newcombs then asked the superior court to either clarify or reconsider its ruling. But, the superior court ordered Newcombs to produce the files, at their own expense, by January 22, 2002 ("production ruling"). On January 17, 2002, Newcombs moved to stay the production ruling, informing the court they had filed a special action with this court. The special action filed with this court, among other things, sought review of the superior court's production ruling and one expert ruling.

¶18 On February 1, the Hospital, Karayianis, and Dr. Crowe and SMI moved for summary judgment. Dr. Medley joined in Dr. Crowe's and SMI's motion for summary judgment, and Bair joined in all of the defendants' motions for summary judgment. The court scheduled oral argument on the motions for March 29.

¶19 For reasons not explained in the record, Newcombs

failed to respond timely to the motions before the response deadline. See Ariz. R. Civ. P. 56(c) (1). By minute entry filed March 28, 2002 (mailed to all counsel), the superior court stated it had reviewed the legal file and had received no
responses from Newcombs to the motions for summary judgment, and accordingly vacated oral argument.[8]

¶20 On March 28, 2002, we accepted jurisdiction of Newcombs' special action in part, and modified the superior court's production ruling, ordering Newcombs to turn over the former attorneys' files to the superior court first for an in camera inspection and narrowing the range of documents to only those relating to the fraud allegations and the alleged resulting increase in litigation costs.[9] However, we declined special action jurisdiction on the one expert ruling.

¶21 In a minute entry filed on April 10, 2002, after stating it had reviewed the summary judgment motions, the legal file and the applicable case law, the superior court granted the pending summary judgment motions. As to Dr.

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[8] The record reflects Newcombs actually filed a four-page response to Karayianis's motion for summary judgment, which, according to the superior court's date stamp, was filed on March 20, 2002. However, the response was mislabeled. Specifically, in addition to moving for summary judgment, Karayianis had filed a separate motion asking the court to summarily dismiss the case against it because Newcombs had failed to produce their former attorneys' files and designate their expert. Newcombs responded to this motion and used the title of their response to this motion as the title to their response to Karayianis' s summary judgment motion. Therefore, because of the mislabeling, the superior court may have believed Newcombs had filed a duplicative response unrelated to Karayianis's pending summary judgment motion. Newcombs never alerted the court that they had responded to Karayianis's summary judgment motion.

[9] The record does not show Newcombs ever produced the files to the superior court for review.

Crowe and SMI, it found "no evidence upon which a jury could find that Dr. Crowe's actions constituted fraud" and "no evidence that the 'misinterpretation' of the ultrasounds led to the decisions which led to Dr. Bair's decision about the management of [Mother's] labor"; as to Dr. Medley, it found "no facts upon which a jury could find that [] Dr. Medley's actions in any way caused the injuries suffered by the Plaintiffs"; and as to Karayianis, it found Newcombs' expert's disagreement with Dr. Karayianis's autopsy report did "not create an issue upon which a jury could find fraud," and "[t]here [were] no facts [] upon which a jury could conclude Dr. Karayianis committed fraud in the preparation of her report or that she conspired with anyone to commit a fraud."

¶22 The court also granted summary judgment to the Hospital, finding "[t]here is no evidence [] upon which a jury could find that [the Hospital] was negligent in its decisions to credential Dr. Bair," no evidence the Hospital fell below the standard of care by failing to assure that Dr. Bair maintained
professional liability insurance I and "no facts" upon which a jury could conclude the Hospital participated in any fraud. The court's minute entry did not address Bair's summary judgment motion.

¶23 Subsequently, in early May 2002, the court entered signed judgments for Karayianis, Dr. Crowe and SMI, Dr. Medley, and the Hospital. On May 31, 2002, Newcombs timely appealed the judgments. But, Newcombs failed to pay the filing fees and the appeal was deemed abandoned.
In August 2003, in a signed minute entry, the superior court noted the appeal had been abandoned in July 2002 and that there had been "no other activity in the case since that date." It dismissed all unadjudicated claims and all unserved parties.

¶24 On November 15, 2004, more than

two-and-a-half years after the superior court had granted summary judgment, Newcombs, represented by new counsel, moved for Rule 60(c)(6) relief from the judgments granted to the defendants and other parties previously dismissed from the case.[10] Newcombs argued Rule 60 (c) (6) relief was warranted because of the "clear policy to protect a minor's right of action during minority" and "there was no sign at all of any actual representation of the minor's interests in Court." Newcombs also argued the defendants perpetrated fraud upon the court. The superior court denied Newcombs' Rule 60 (c) (6) motion, stating: "Relief, if relief is to be had, is not through this litigation."

¶25 Newcombs timely appealed.[11] We have jurisdiction

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[10] Rule 60(c) states in pertinent part:
On motion and upon such terms as are just the court may relieve a party or legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. This rule does not limit the power of a court to entertain an independent action or to set aside a judgment for fraud upon the court.

[11] SMI argues it is not involved in this appeal as an appellee because Newcombs did not list it in the body or caption of the notice of appeal, or the caption of their opening brief. We disagree. SMI was granted summary judgment in 2002. It participated in the briefing and oral argument on Newcombs' Rule 60 (c) (6) motion. The superior court collectively denied Rule 60(c) (6) relief, not separating out arguments as to each defendant. Newcombs appealed from that collective denial and sent the notice of appeal to SMI's counsel. Although Newcombs did not list SMI in the caption of the opening brief, Newcombs' brief asked this court to vacate the judgment in favor of SMI. Thus, SMI was given adequate notice it was a party to this appeal and was not prejudiced; we,

pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(C) (2003).

DISCUSSION

¶26 On appeal, Newcombs focus on opening the judgments entered against Daughter, a minor.[12] First, Newcombs argue Daughter was abandoned by counsel at the time the motions for summary judgment were presented to the superior court and the court, "having extensive advance knowledge of the abandonment," therefore had a duty to ensure actual legal representation of Daughter because she was a minor. Second, Newcombs argue Defendants/Appellees perpetrated fraud upon the court.

¶27 After careful review of the record and legal authority from Arizona and other jurisdictions, we agree with the superior court that Newcombs were not entitled to relief from the judgments.[13]

I. Minor Daughter Abandoned by Counsel

¶28 As stated above, Newcombs argue counsel

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therefore, deem it a proper appellee. *See Hill v. City of Phoenix*, 193 Ariz. 570, 573, '3! 13, 975 P.2d 700, 703 (1999); *Hanen v. Willis*, 102 Ariz. 6, 10, 423 P.2d 95, 99 (1967).

[12] Apparently recognizing the precedential force of *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000), discussed infra ¶ 29, as applied to adult litigants, Newcombs argue only in a footnote that the judgments should be vacated as to Father.

[13] Karayianis, Dr. Crowe, Dr. Medley and SMI argue Newcombs did not file the Rule 60(c) (6) motion "'within a reasonable time.'" *See supra* note 10. Because of our discussion on other issues, we do not need to address this argument.

abandoned Daughter, and the superior court, knowing of the "abandonment," had a duty to ensure actual legal representation of Daughter because she was a minor. In making this argument,[14] Newcombs attempt to distinguish our supreme court's decision in *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000).

¶29 In *Panzino*, the supreme court rejected the "positive misconduct rule" and denied Rule 60 (c) (6) relief in a case in which the attorney had abandoned his client. 196 Ariz. at 449, ¶¶24-25, 999 P.2d at 205. The "positive misconduct rule," where adopted, permits a trial court to grant Rule 60 (c) (6) relief when the attorney's neglect of a client's case is so "extreme" that, in effect, there is an obliteration of the "existence of the attorney-client relationship" and the attorney's "negligence should not be imputed to the client." *Id.* at 445, ¶ 8, 999 P.2d at 201 (quoting *Carroll v. Abbott Lab. Inc.*, 654 P.2d 775, 778 (Cal. 1982)). In rejecting the "positive misconduct rule," the *Panzino* court stated, "[w]e cannot consistently hold that although Rule 60(c) (1) allows relief for judgment only for excusable neglect, Rule 60 (c) (6) allows relief from inexcusable neglect in the form of abandonment." *Id.* at 446, ¶11, 999 P.2d at 202. Consequently, attorney inexcusable neglect is not a basis for Rule 60(c) relief. *Id.* at 449, ¶ 24, 999 P.2d at 205 ("Although we do not disregard the plaintiff's difficulties in this case, the overall effect of limiting Rule 60(c) relief for a lawyer's legally excusable activity appears to be de minimis.").

¶ 30 Here, Newcombs do not argue counsel's neglect

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[14] The arguments raised here are legal ones which we decide de novo. *In re Estate of Travers*,192 Ariz. 333, 334, ¶ 11, 965 P.2d 67, 68 (App. 1998).

was excusable; indeed, in labeling counsel's representation of Daughter as one of "abandonment," Newcombs concede counsel was guilty of "inexcusable neglect." Thus, in order to distinguish *Panzino*, Newcombs have framed the issue In this case as one involving the duty of the superior court to protect a minor's legal rights and ensure actual legal representation. The problem for Newcombs is that they have cited no Arizona law, and we have found none, specifically requiring the superior court to ensure actual legal representation of a minor when, as here, the minor, in addition to having a next-of-friend looking after the minor's interests, is represented by counsel of record.

¶ 31 Newcombs rely on *Byers-Watts v. Parker*, 199 Ariz. 466, 18 P.3d 1265 (App. 2001), and Arizona Rule of Civil Procedure 17(g) to support their argument. Although these authorities state a general policy of promoting and protecting the interests of minors, they are not "on all fours" with the facts of this case and do not impose on the superior court a specific duty to ensure actual legal representation of a minor.[15]

¶ 32 In *Byers-Watts*, we held that a parent, who brought a lawsuit on behalf of her child as next of friend and guardian ad litem, could not further represent and provide legal representation for the child, and instead the "non-attorney parent must be represented by an attorney to maintain a lawsuit on behalf of a child or incompetent person." 199 Ariz. at 470, ¶ 17, 18 P.3d at 1269. While the case expressed a general policy toward protecting the

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[15] Newcombs also rely on *Barrio v. San Manuel Div. Hosp.*, 143 Ariz. 101, 692 P.2d 280 (1984), and *Porter v. Triad of Ariz.*, 203 Ariz. 230, 52 P.3d 799 (App. 2002). But, likewise, these citations miss the mark. These cases deal with the tolling of the statute of limitations for minors and not the duty of the superior court to ensure actual legal representation of a minor - the theory advanced here.

interests of minors, *see id.* at 470-71, ¶ 19, 18 P.3d at 1269-70, its holding simply has no application to the facts of this case. At all relevant times throughout this lawsuit, Daughter was represented by legal counsel. Father served as Daughter's next of friend, but did not purport to act as her legal representative the issue in *Byers-Watts.*

¶ 33 Newcombs' reliance on Rule 17(g) is also misplaced. Rule 17(g) "empowers the trial court to take the necessary steps to ensure that minors or other incompetent persons are capable of defending actions brought against them." *Montano v. Browning*, 202 Ariz. 544, 548, ¶ 9, 48 P.3d 494, 498 (App. 2002)(citing *Cubbison v. Cubbison*, 45 Ariz. 14, 40 P.2d 86 (1935)). Rule 17(g) states in full:

> Whenever an infant or incompetent person has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative the infant or incompetent may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 17(g), however, did not require the superior court to appoint anyone for Daughter to represent her or act on her behalf. She had an actual representative - her Father. Father, serving as Daughter's next of friend, looked after her interests. Although Newcombs imply Father either was unaware or uninvolved in the case, the record reflects, in January 2001, Father responded to interrogatories. His response included a seven-page narrative in which he stated,

"I have personally expended more than $10,000 of my own money in traveling to and from Arizona, including assisting [Daughter] and Joan Donato [Mother's mother]." Father also detailed multiple conversations he had with former counsel. Accordingly, Father was aware, involved and looking after Daughter's interests during the litigation. *See Seibels, Bruce & Co. v. Nicke*, 168 F.R.D. 542, 544 (M.D.N.C. 1996) ("Nothing else appearing, it may be presumed that a parent acts in the best interest of the child.").

¶ 34 Rule 17(g) further did not require the superior court to appoint a guardian ad litem for Daughter. Daughter had Father, as next of friend, looking after her interests, and did not need a guardian ad litem. *See Geddes v. Cessna Aircraft Co.*, 881 F. Supp. 94, 100 (E.D.N.Y. 1995) ("A guardian does not have to be appointed if the infant's interests are amply represented and protected."). No conflict existed between Daughter's and Father's interests. *Id.* ("District Courts should attempt to decrease costs by refraining from appointing guardians unless there is a substantial likelihood that a conflict of interest may exist and an infant may need protection.") Finally, nothing in Rule 17(g) specifically required the superior court to ensure actual legal representation from counsel, which is really what Newcombs argue.

¶ 35 Adopting Newcombs' suggestion that there is a *per se* "reversible" duty on the superior court to ensure actual legal representation of minors, seriously undermines the important policy of finality. In *Panzino*, the Supreme Court of Arizona reinforced the importance of finality of judgments:

> Although our trial courts enjoy broad discretion when deciding whether to set aside judgments under Rule 60(c), that discretion "is circumscribed by public policy favoring finality of judgments and termination of

> litigation. " *Waifersong, Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th cir.1992). Parties to a legal action should thereafter be "entitled to rely upon such adjudication as a final settlement of their controversy." *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir.1958). Permitting relief from judgments entered as a result of an attorney's actions clearly undermines the "undeniable public policy that recognizes the finality of judgments and discourages multiplicitous litigation." *Smith v. Saxon*, 186 Ariz. 70, 74 n. 3, 918 P.2d 1088, 1092 n. 3 (1996).

196 Ariz. at 448, ¶19, 999 P.2d at 204.

¶36 Here, Newcombs ask us to vacate the summary judgments granted to some of the Defendants/Appellees more than two-and-a- half years ago and allow them to restart the case against other Defendants/Appellees, who, because of strategic choices made by Newcombs (i.e., Dr. Finney and Heartcare) or court rulings (i.e., Dr. Weiland), have been out of this case even longer. However, as reinforced by our supreme court, Defendants/Appellees are entitled to rely upon such prior adjudications as final settlements of their controversy. *Id.* at 448, ¶18, 999 P.2d at 204. We therefore follow the "undeniable public policy" that recognizes the finality of judgments and discourages multiplicitous litigation, *id.*, and decline to adopt Newcombs' proposed *per se* rule.

¶37 Further, the first premise upon which Newcombs' argument rests – that counsel abandoned Daughter and she did not have "actual" representation – is not borne out by the record. The record does not show Newcombs' counsel failed to communicate wi th the court or opposing counsel for a sustained period of time, permitting an inference that counsel had forgotten about or was no longer pursuing Daughter's

case. Rather, the record shows Newcombs' counsel was actively litigating the case at the time the summary judgment motion were filed. Just two weeks before defendants moved for summary judgment, Newcombs had filed a special action challenging the superior court's production ruling and one expert ruling. Newcombs' lawyers pursued the special action and, indeed, won partial relief.

¶38 The reality is that Newcombs received actual representation throughout the case but, for reasons not explained, received grossly deficient legal representation at the very end of the case. But, grossly deficient legal representation does not entitle a party to Rule 60(c) (6) relief in Arizona. Why counsel failed to respond to all but one of the summary judgment motions remains a mystery. Had Newcombs presented the superior court wi th a record that explained why, with one exception, *see supra* note 8, responses were not filed they might have been in a better position to convincingly distinguish *Panzino*. But, based on the record before us, this case is governed by *Panzino*.

¶39 The second premise underlying Newcombs' first argument – that the superior court knew counsel had abandoned Daughter – is also not clear from the record. At the time it ruled on the summary judgment motions, Newcombs' counsel was actively and aggressively opposing the production ruling and one expert ruling. Since counsel had not abandoned Daughter on these matters, the superior might have believed Newcombs' failure to respond to the summary judgment motions was tactical, perhaps because they did not have a meritorious response or because the court's production ruling required them to produce documents containing information injurious to their case. The superior court apparently believed Newcombs' counsel purposefully or tactically decided not to respond because, during oral argument on the Rule 60 (c) (6) motion, it described the absence of counsel as "[c]alculated." Although

the superior court did not consider Newcombs' response to Karayianis's motion for summary judgment,[16] objectively, Newcombs' argument that counsel abandoned Daughter is further contradicted by counsel's actions in responding to Karayianis's summary judgment motion and motion for summary dismissal. *See supra* note 8.

¶40 Thus, Newcombs were not entitled to Rule 60(c)(6) relief. Arizona law does not place a duty on the superior court to ensure minors receive actual legal representation when, as here, they have next of friend and counsel of record. Adopting a per se "reversible" duty on the superior court to ensure actual legal representation for minors would undermine the finality of judgments and limit the supreme court's holding in *Panzino* in a manner completely at odds with its reasoning. And finally, the facts here do not plainly

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[16] We note that Newcombs did not argue below or on appeal that they were entitled to Rule 60(c)(6) relief because the superior court failed to consider their response to Karayianis's summary judgment motion. Consequently, any such argument has been waived. We also note that, in moving for summary judgment, Karayianis gave the court the affidavit of Ronald Wright, M.D., and thus the court had before it the opinion of at least one of Newcombs' experts. Dr. Wright, a pathologist, exhumed Mother's body and performed an autopsy. Dr. Wright's affidavit stated that the fibroid tumors were not located in Mother's fundus (back/top) of the uterus (as Dr. Karayianis's autopsy report concluded) but instead were lower. Grover Hutchins, M.D., another pathologist, relied on the slides taken by Dr. Wright and similarly concluded a large fibroid was in the lower uterine segment and not in the posterior fundus. Although the superior court did not consider Newcombs' response to Karayianis' s motion for summary judgment, given the overlapping similarities in the experts' opinions, it did have before it, through the Wright affidavit, information that Newcombs had developed in the course of pursuing their case against Karayianis and the other defendants. Nevertheless, the superior court found that Newcombs' expert's disagreement with the conclusions contained in Karayianis's autopsy report failed to raise a jury issue on fraud. *See supra* ¶ 21.

show counsel abandoned Daughter and the superior court knew or should have known of any alleged abandonment.

II. Fraud Upon the Court

¶41 Newcombs next assert that Rule 60(c) (6) relief is justified because Defendants/Appellees perpetrated fraud upon the court.[17] We disagree.

¶42 We do not need to summarize in detail the nature of the fraud Newcombs allege here. It suffices to say the fraud centers mainly around Dr. Karayianis's autopsy report, Dr. Crowe's ultrasound report prepared for Dr. Bair during the pregnancy, and changes allegedly made by the Hospital's nurses to their notes. The core of the alleged fraud is that Defendants/Appellees attempted to cover up the true cause of Mother's death, which Newcombs assert was placenta previa and further blockage of the birth canal by large fibroids, not AFE as Defendants/Appellees alleged.

¶43 Defendants/Appellees counter that the alleged fraud was the same fraud that Newcombs had alleged early on in the case, and it did not rise to the level of fraud upon the court. We agree. The fraud Newcombs assert here is

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[17] To be precise, we note that, although Newcombs argue fraud upon the court under Rule 60 (c) (6), fraud upon the court is a separate independent action and not grounds for relief under Rule 60 (c). 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 2868 (2d ed. 1995) . However, Defendants/Appellees failed to argue this distinction below and have waived the argument on appeal. *See also U.S. v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002) (construing motion seeking relief for fraud upon the court, misstyled as a motion for relief under 60 (b) (6), the federal equivalent of Arizona's 60 (c) (6), as an independent action or a pleading invoking the court's inherent power to grant relief for fraud upon the court because the substance of the plea controls and no purpose would be served by denying relief on the ground of misstyling).

plainly not fraud upon the court.

¶44 In *Lake v. Bonham,* we stated "the requirements necessary to set aside the judgment [based on fraud upon the court] are more onerous." 14 8 Ariz. 599, 601, 716 P.2d 56, 58 (App. 1986). We explained:

> The cases in which it has been found that there was or might have been a 'fraud upon the court,' for the most part, have been cases in which there was 'the most egregious conduct involving a corruption of the judicial process itself. ' The concept clearly includes bribery of a judge or the employment of counsel in order to bring improper influence on the court.

Id. (citation omitted).

¶45 Furthermore, in In re *Hadtrath*, the Supreme Court of Arizona noted that "[p]erjury or misrepresentations to the court do not constitute a fraud on the court unless the adverse party was prevented from presenting a defense." 121 Ariz. 606, 610, 592 P.2d 1262, 1266 (1979) (quoting *Hartford v. Hartford*, 371 N.E.2d 591, 595 (Ohio Ct. App. 1977)).

¶46 Based on the above-stated principles, the fraud alleged here was not fraud upon the court. The fraud alleged does not involve corruption of the judicial process itself, and does not include bribery or improper influence on the court. Newcombs were not prevented from arguing the fraud. During the litigation, Newcombs brought to the court's attention that they had discovered the "true" cause of Mother's death, placenta previa, filed *Newcomb II* asserting fraud claims against a host of defendants, and presented evidence which they believed showed a fraudulent cover-up by the defendants.

¶47 Newcombs' reliance on *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), disapproved of

on other grounds by *Standard Oil Co. of Cal. v. U.S.*, 429 U.S. 17 (1976), is misplaced. There, Hartford received a patent on a "gob feeding" machine in part because of a spurious publication. *Id.* at 240-41. The publication purported to be an objective and impartial study, even though it was actually written by one of Hartford's attorneys. *Id.* at 240. Hartford then brought a patent infringement suit against Hazel-Atlas, which the district court dismissed, concluding no infringement of the "gob feeding" machine patent had occurred. *Id.* at 241. Although the publication did not play an important role in the district court, on appeal to the Circuit Court, Hartford's attorneys affirmatively used the publication to convince the Circuit Court an infringement had occurred. *Id.* The Circuit Court reversed the district court and ordered judgment entered for Hartford. *Id.* Subsequently, Hazel-Atlas discovered the phony nature of the publication, and moved to vacate the judgment. *Id.* at 243. However, the Circuit Court declined relief. *Id.* at 243-44. Relying on the "historic power of equity to set aside fraudulently begotten judgments," the United States Supreme Court vacated the underlying judgment and stated:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. . . . This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. . . . Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more

> than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently wi th the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 245-46.

¶48 The fraud alleged here involved a single litigant and private parties. Newcombs have been alleging this fraud for over ten years and it has been before the court front-and-center. The alleged fraud was a prominent part of the case before the "sham trial," was alleged in the *Newcomb II* complaint, was the reason why the court made the production ruling and one expert ruling, and was addressed by the superior court when it dismissed the fraud claim against Dr. Weiland and considered again by the court in 2002 when it granted the summary judgment motions. Given the alleged fraud's importance in the case and its extensive consideration by the court, the superior court was never defrauded as was the Patent Office and Circuit Court of Appeals In *Hazel-Atlas*; no violation of the public welfare or justice occurred.

¶49 Newcombs are unable to point to any new fraudulent conduct committed by Defendants/Appellees, particularly fraud in procuring the grants of summary judgment. Newcombs suggest the unsigned affidavit and signed letter of Cynthia Cooke, M.D. evidenced *new fraudulent conduct*. Dr. Cooke, a Newcombs expert and obstetrician, had reviewed Newcombs' case in 1991 and

initially decided that Newcombs' medical malpractice case was without merit; but years later, she reversed her opinion, claiming she had been misled by falsified medical records. We acknowledge Dr. Cooke submitted an opinion letter as recent as September 10, 2004, so it may be considered a newer (or more recent) allegation of fraud. But, while it may be a newer allegation, Dr. Cooke's letter clearly details the same fraud that allegedly had occurred in the aftermath of Mother's death. Newcombs' fraud upon the court argument fails.

III. Dr. Weiland

¶50 Newcombs separately argue the judgment in favor of Dr. Weiland on the wrongful death claim should be vacated as to Daughter because our September 15, 1998 decision in *Newcomb II* was based on the expiration of the statute of limitations and, after our decision, the law changed.

¶51 In *Porter*, 203 Ariz. at 234, ¶ 21, 52 P.3d at 803, Division One of this court disagreed with Division Two's decision in *Gomez v. Leverton*, 19 Ariz. App. 604, 509 P.2d 735 (1973), and held the minority tolling statute applied to the wrongful death claim of a minor. However, "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment." *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989); *cf. Schmidt* v. *Schmidt*, 158 Ariz. 496, 499, 763 P.2d 992, 995 (App. 1998) ("a change in law relating to community property interests in retirement benefits is insufficient, in and of itself, to compel modification of a property disposition" (citing *De Gryse v. DeGryse* , 13 5 Ariz . 335, 661 P.2 d 18 5 (1983))). We follow that rule here and refuse to set aside the wrongful death judgment for Dr. Weiland, which has been final for over seven years.

CONCLUSION

¶52 For the foregoing reasons, we affirm the superior court's denial of Newcombs' motion for Rule 60(c) (6) relief.

PATRICIA K. NORRIS, Judge

CONCURRING:

PATRICIA A. OROZCO, Presiding Judge

JEFFERSON L. LANKFORD, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CAROLINE ANNE NEWCOMB, by and through her her next friend and natural father THOMAS W. NEWCOMB; THOMAS W. NEWCOMB, as natural parent of CAROLINE ANNE NEWCOMB; THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB, deceased, on his own behalf and for and on behalf of CAROLINE ANNE NEWCOMB, Plaintiffs/Appellants, v. JAMES R. BAIR, M.D.; JAMES R. BAIR, M.D., P.C., SCOTTSDALE MEMORIAL HEALTH SERVICES, d/b/a SCOTTSDALE MEMORIAL HOSPITAL -OSBORN, an Arizona corporation, Defendants/Appellees. ========== CAROLINE ANNE NEWCOMB, a minor, by and through her next friend and natural father THOMAS W. NEWCOMB; THOMAS W. NEWCOMB, as natural	)	1 CA-CV 05-0569 DEPARTMENT E Maricopa County Superior Court No. CV 1992-022705 CV 1996-007173 (Consolidated) **ORDER**

parent of CAROLINE ANNE NEWCOMB; THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB, deceased, on his own behalf and for and on behalf of CAROLYN ANNE NEWCOMB,

Plaintiffs/Appellants,

v.

SCOTTSDALE MEMORIAL HEALTH SERVICES, CO., INC., an Arizona corporation; SCOTTSDALE MEMORIAL HOSPITALS, an Arizona corporation; SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC., an Arizona company; SCOTTSDALE MEDICAL IMAGING, LTD., an Arizona company; J.K. CROWE, M.D.; B.E. MEDLEY, M.D.; SHARON LYNN KARAYIANIS, M.D.; SCOTTSDALE PATHOLOGY ASSOCIATES, LTD., an Arizona corporation; JAMES R. BAIR, M.D., P.C.; JAMES R. BAIR, M . D.; JUDY FINNEY, M . D. ; HEARTCARE, P.C., an Arizona corporation,

Defendants/Appellees.

The above-mentioned matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision

be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the Memorandum Decision, be sent to each party appearing herein or to the attorney for such party, and to the Honorable Rebecca A. Albrecht, Judge (Retired)

DATED this 11th day of July, 2006.

PATRICIA K. NORRIS, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

[ARIZONA COURT OF APPEALS CAPTION SAME AS IMMEDIATELY PRECEEDING DOCUMENT]

Plaintiff/Appellee's "Motion for Reconsideration" filed on July 11, 2006 was considered by the Court.

IT IS ORDERED denying the motion. The arguments raised in the motion were addressed in our memorandum decision issued July11, 2006.

Dated this 8th of August, 2006.

Patricia K. Norris, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1992-022705 03/14/2005
CONSOL.

CLERK OF THE COURT
HONORABLE REBECCA A. ALBRECHT
K. Ballard
Deputy

FILED: 03/16/2005

CAROLINE ANNE NEWCOMB, et al
K LAYNE MORRILL
J TYRRELL TABER

v.

JAMES R BAIR, et al.
JAMES R BAIR
355 JENNINGS MILL PKWY
#312
ATHENS GA 30606

KATHRYN L BUSBY
STEPHEN PAUL FORREST
MICHAEL C JOHNSON
STEPHEN C YOST
WILLIAM R JONES JR.
JOHN J EGBERT

RULING

The history of this litigation is detailed in the pleadings filed by the parties; it suffices for this ruling to note the following:

This matter was once tried, the verdict obtained through that trial was appealed, and the matter was reversed and remanded for a new trial. The case was again proceeding toward trial. In late 2001, the Defendants filed a number of motions for summary judgment. The Plaintiffs did not respond. Ultimately, in considering the motions filed, the Court granted summary judgment in favor of the Defendants. Judgment was entered in May 2002. Plaintiffs then filed a Notice of Appeal. The appeal was later dismissed as abandoned.

On November 15, 2004 Plaintiffs filed their Consolidated Motion to Open and Vacate Judgments pursuant to Rule 60(c)(6) Ariz.R.Civ.P. The Plaintiffs urge that the extraordinary circumstances of this case and the total abandonment of the Plaintiffs by their attorneys requires that the Court grant them the requested relief and permit this case to proceed to trial.

The position taken by the Plaintiffs was rejected by the Arizona Supreme Court in *Panzino v City of Phoenix*, 196 Ariz.442, 999 P.2d 198 (2000). The issue before the Court and the Court's conclusion as stated by Justice McGregor was:

> ... whether Arizona should adopt the positive misconduct rule, which permits a client whose attorney has abandoned him or her to obtain relief from a judgment by invoking Rule 60(c)(6) of the Arizona Rules of Civil Procedure. We decline to adopt the rule because doing so would require us to abandon our long-standing interpretation of Rule 60(c) and to overturn established principles of law. (Paragraph 1)

The Court went on in its discussion to state:

> Moreover, adopting the positive misconduct rule would result in the irrational holding that Rule 60(c) applies to actions in which attorneys engaged in excusable neglect or to actions in which attorneys completely abandoned their clients, but not to actions involving attorney activities that fall between those t\vo extremes.
> (Paragraph 13)

> We reject the positive misconduct rule for yet another reason that we regard as significant: the 1111e can encourage lawyers "who have lapsed into carelessness to deliberately expand their neglect to a level of egregiousness as a tactic to save their client's case." (Paragraph 20)

The outcome is not changed because the person on whose behalf the motion is brought is a minor. This case was brought on the child's behalf by her father and next friend, Thomas Newcomb. Mr. Newcomb and Caroline were represented by counsel; Mr. Newcomb was not attempting to represent his daughter, something that is precluded by Arizona law. The discussion of tbe tolling of statute of limitations for the minority of the Plaintiff does not forward the Plaintiffs' argument here.

Plaintiffs urge that this case is so egregious that the Court should ignore the holdings of the Supreme Court and grant the requested relief. This case though demonstrates most clearly the wisdom of the Court's ruling, here with a minor child involved who cannot understand for herself what

is happening, the attorneys representing her have indeed "expand(ed) their egregiousness".

The Judgment is final. Relief, if relief is to be had, is not through this litigation.

IT IS ORDERED denying the Plaintiffs' Consolidated Motion to Open and Vacate Judgments pursuant to Rule 60(c)(6) Ariz.R.Civ.P.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CAROLINE ANNE NEWCOMB, a minor, by and through her next friend and natural father, THOMAS W. NEWCOMB; THOMAS W.NEWCOMB, as natural parent of CAROLINE ANNE NEWCOMB; and THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB, deceased, on his own behalf and for and on behalf of CAROLINE ANNE NEWCOMB:	:CASE NO. CV 92-022705 :CASE NO. CV 96-007173 : (Consolidated) : : : :(Assigned to the : Honorable Rebecca A. : Albrecht) : : ORDER DENYING : PLAINTIFFS' MOTION : UNDER RULE 60(C)(6) ARIZ. R. CIV. P.
Plaintiffs, vs. JAMES R. BAIR, M.D., JAMES R. BAIR, M.D., P.C., SCOTTSDALE MEMORIAL HEALTH SERVICES, dba SCOTTSDALE MEMORIAL HOSPITAL-OSBORN, an Arizona corporation; and DOES I - XXX, Defendants	: : : : : : : : : : :
CAROLINE ANNE NEWCOMB, a minor, by and through her next friend and natural father THOMAS W. NEWCOMB; THOMAS W. NEWCOMB, as natural	: : : :

parent of CAROLINE ANNE NEWCOMB; and THOMAS W. NEWCOMB, the surviving husband of CHERYL ANNE NEWCOMB, deceased, on is own behalf and for and on behalf of CAROLINE ANNE NEWCOMB

Plaintiffs,

vs.

SCOTTSDALE MEMORIAL HEALTH SERVICES, CO., INC., an Arizona corporation; SCOTTSDALE MEMORIAL HOSPITALS, an Arizona corporation; SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC., an Arizona company; J.K. CROWE, M.D.; B.B. MEDLEY, M.D.; SHARON LYNN KARAYIANIS, M.D., SCOTTSDALE PATHOLOGY ASSOCIATES, LTD., an Arizona corporation; JAMES R. BAIR, M.D., P.C., JAMES R. BAIR, M.D., Does I through XX,

Defendants.

Plaintiffs Consolidated Motion to Open and Vacate Judgments pursuant to Rule 60(c)(6) of the *Arizona Rules of Civil Procedure*, having been fully briefed and argued to the Court, and the Court finding that there is no just reason to delay entry of judgment pursuant to Rule 54(b) of the *Arizona Rules of Civil Procedure*:

IT IS HEREBY ORDERED that Plaintiffs

Consolidated Motion to Open and Vacate Judgments pursuant to Rule 60(c)(6) of the Arizona Rules of Civil Procedure is finally adjudicated, dismissed and denied in accordance with the minute entry of the Court dated March 14,2005 which was entered upon the docket of this case on March 16th, 2005.

July 20, 2005 JUDGE REBECCA A. ALBRECHT

DATED this __ of March, 2005

Honorable Rebecca A. Albrecht

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

*** FILED ***
03/28/2002

03/26/2002

CLERK OF THE COURT
FORM VOOOA

HONORABLE REBECCA A. ALBRECHT

N. Greene
Deputy

CV 1992-022705

FILED:

CAROLINE ANNE NEWCOMB, et al.
v.
JAMES R BAIR, et al.

TIMOTHY A FORSHEY

THOMAS G BAKKER

STEPHEN PAUL FORREST
WILLIAM R JONES JR
PETER MINEO - PRO HAC VICE 315 S E 7TH ST 2ND FL FT LAUDERDALE FL 33301-0000 LAWRENCE F WINTHROP STEPHEN C YOST CRISTINA M CHAIT

MINUTE ENTRY

The Court has reviewed the legal file, no responses have been filed to the Defendants' Motions for Summary Judgement.

IT IS ORDERED vacating the oral argument set

for March 29, 2002 on the Motions for Summary Judgment.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
04/10/2002

04/08/2002

CLERK OF THE COURT
FORM VOOOA

HONORABLE REBECCA
A. ALBRECHT

L. Falkenburg
Deputy

CV 1992-022705 (consol.)

FILED:

CAROLINE ANNE
NEWCOMB, et al.
v.
JAMES R BAIR, et al.

TIMOTHY A FORSHEY

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STEPHEN PAUL FORREST
WILLIAM R JONES JR
LAWRENCE F WINTHROP
STEPHEN C YOST
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SOUTHEAST 3RD AVE
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33301 JAMES R BAIR
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KINGSTREE SC 29556

MINUTE ENTRY

A number of motions for Summary Judgment have been filed.

1. Defendants Scottsdale Medical Imaging, Ltd. and crowe's Motion for Summary Judgment, which is joined by Defendants Bair, Medley and Karayianis.

2. Defendants Karayianis and Scottsdale Pathology Associates, LTD.'s Motion for Summary Judgment, which is joined by Defendant Bair.

3. Defendant Scottsdale Memorial Hospital's Motion for Summary Judgment, which is joined by Defendants Bair and Medley.

Also filed is Defendant Karayianis' Motion to Dismiss.

To none of these motions has a response been filed. No motion to extend the time to respond has been filed. A motion to stay was filed by the Plaintiffs; that Motion was denied by minute entry dated February 25, 2002. No stay was granted by the Court of Appeals. The time to respond has passed by 30 days. The Court of Appeals Decision on Special Action was issued on March 28, 2002.

The motion to dismiss the complaint seeks dismissal based upon the matters upon which this court was reversed by the Court of Appeals. The court therefore declines to grant the motion to dismiss based up the Plaintiff's failure to comply with an order which has now been reversed.

The motions for summary judgment have been reviewed by the court. The court has further reviewed the legal files and the applicable case law.

Mrs. Newcomb died on January 5, 1991 following

complications during childbirth. The Plaintiff alleges that the Defendants fell below the standard of care in various ways, all of which it is alleged led to her death.

1. Defendants Crowe and Scottsdale Medical Imaging's (SMI) Motion for Summary Judgment:

It is alleged that Dr. Crowe and SMI failed to accurately report the location of uterine fibroids. The further allegation is that if these had been correctly diagnosed, Dr. Bair, Mrs. Newcomb's obstetrician would have managed her care differently and the delivery would have proceeded without incident. Further, it is alleged that Dr. Crowe committed fraud by rewriting and falsifying his ultrasound report of July 25, 1990; it is alleged this was done to prevent discovery of the cause of death and thereby avoid litigation.

Mrs. Newcomb had a number of ultrasounds performed; one on April 2, 1990 which was interpreted by Dr. Newbold. On July 25, 1990, SMI/Dr. Crowe performed and interpreted a pelvic ultrasound at the request of Dr. Bair. On July 30, 1990, another ultrasound was performed at the request of Dr. Bair; this ultrasound was interpreted by Dr. Medley. After that time, SMI had no contact with Mrs. Newcomb. SMI, consistent with its practice, sent a written report to Dr. Bair containing the interpretations of the three ultrasounds SMI performed.

There is no evidence presented to the court upon which a jury could find that Dr. Crowe's report contains a knowingly false material representation. There is no evidence presented to the court upon which a jury could find that Dr. Crowe's actions constituted fraud.

There is no evidence that the 'misinterpretation' of

the ultrasounds led to the decisions which led to Dr. Bair's decision about the management of Mrs. Newcomb's labor.

Based upon the foregoing and all the matters presented to the court,

IT IS ORDERED granting Defendants Crowe and SMI' s Motion for Summary Judgment.

IT IS FURTHER ORDERED dismissing this case as to Defendants Crowe and SMI.

This motion was joined by Dr. Medley who filed his own pleading based upon that motion and statement of facts. With regard to Dr. Medley, there are no facts presented upon which a jury could find that Dr. Medley's interpretation of the ultrasound had any bearing upon the labor and delivery decisions made by Dr. Bair.

There are no facts upon which a jury could find that Dr. Medley's actions in any way caused the injuries suffered by the Plaintiffs.

IT IS ORDERED granting the Defendant Medley's Motion for Summary Judgment.

IT IS FURTHER ORDERED dismissing this case as to Defendant Medley.

2. Defendants Karayianis and Scottsdale Pathology Associates, Ltd.'s Motion for Summary Judgment:

With regard to Dr. Karayianis and Scottsdale Pathology Associates, the Plaintiffs assert that they incurred damages as a result of their reliance on Dr. Karayianis' allegedly fraudulent autopsy report. And that the doctor

conspired with others to commit fraud. Dr. Karayianis issued an autopsy report. The Plaintiffs' expert disagrees with the conclusions contained in that report. A disagreeing opinion does not create an issue upon which a jury could find fraud.

There are no facts presented upon which a jury could conclude that Dr. Karayianis committed fraud in the preparation of her report or that she conspired with anyone to commit a fraud.

Based on the matters presented to the court,

IT IS ORDERED granting Defendant Karayianis and Scottsdale Pathology Associates, Ltd.'s Motion for Summary Judgment.

3. Defendant Scottsdale Memorial Hospital's Motion for Summary Judgment:

The claims against Scottsdale Memorial Hospital (SMH) are that negligently credentialed Dr. Bair failed to ensure that Dr. Bair maintained professional liability insurance and fraud.

There is no evidence presented upon which a jury could find that SMH was negligent in its decisions to credential Dr. Bair. There is no evidence upon which a jury could find that SMH fell below the standard of care and thereby caused injury to the Plaintiffs by failing to assure that Dr. Bair maintained professional liability insurance. As to the fraud claim, again there are no facts upon which a jury could [sic] concluded that SMH participated in any fraud with relation to this matter.

IT IS ORDERED granting Scottsdale Memorial Hospital's Motion for Summary Judgment.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

*** FILED ***

05/06/2002

05/03/2002

HONORABLE REBECCA A. ALBRECHT

CLERK OF THE COURT
FORM VOOOA

L. Falkenburg
Deputy

CV 1992-022705
(consol.)

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CRISTINA M CHAIT
JAMES R BAIR
801 WOODLAND
KINGSTREE SC 29556

MINUTE ENTRY

Judgment having been granted by this Court as to all remaining Defendants and matters,

IT IS ORDERED vacating the trial set to begin on

May 6, 2002 in this division.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 1992-022705 08/06/2003

CLERK OF THE COURT
HONORABLE REBECCA A. ALBRECHT

N. Greene
Deputy

FILED: 08/13/2003

CAROLINE ANNE NEWCOMB, et al.
v.
JAMES R BAIR, et al.

TIMOTHY A FORSHEY

THOMAS G BAKKER

KATHRYN L BUSBY
LEONARD W COPPLE
STEPHEN PAUL FORREST
WILLIAM R JONES
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315 S E 7TH ST
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33301-0000
ROGER C MITTEN
LAWRENCE F WINTHROP
STEPHEN C YOST

MINUTE ENTRY

The court has reviewed the legal file. The appeal in this matter was returned to the trial court as abandoned in July 2002. There has been no other activity in the case since that date.

IT IS ORDERED dismissing this case as to all unadjudicated claims and all unserved parties.

/S/ Honorable Rebecca A. Albrecht

HONORABLE REBECCA A. ALBRECHT
JUDICIAL OFFICER OF THE SUPERIOR COURT

STATE OF MARYLAND)

) SS

BALTIMORE CITY)

AFFIDAVIT OF GROVER MacGREGOR HUTCHINS, M.D.

Grover MacGregor Hutchins, M.D., after being first duly sworn, deposes and says the following:

1. My name is Grover MacGregor Hutchins, M.D. I am a pathologist, having been board certified in Anatomic Pathology by the American Board of Pathology since 1972. My Curriculum vitae, consisting of 93 pages, is attached as "Exhibit A."

2. I have examined the exhumed uterus of Cheryl Newcomb and slides prepared by Ronald K. Wright, M.D. of that specimen. The slides reflect too much autolysis to be of any value. However, the specimen is sufficiently intact to determine whether the very large fibroid is in the fundus or the lower uterine segment.

3. I was able to locate several landmarks on the specimen: (1) the cervix; (2) the surgical incision from the C-section, which contains suture material; and (3) the ovarian ligaments and fallopian tubes. A photograph of the specimen is attached as "Exhibit B." "Exhibit C" is that same photograph with labeling in my hand of the different landmarks. With these landmarks I was able to determine anterior/posterior and left/right, as well as the fundal and cervical regions.

4. It is readily apparent from the specimen that the pathologist who did the autopsy first began the dissection by

cutting upward from the anterior cervix, and then cutting on each side of the uterus so that it opened up, essentially connected, or "hinged," at the fundus. A drawing showing the path of dissection is attached as "Exhibit D."

5. The first dissection was made upward from the anterior cervix and cut through the suture line. I brought the suture lines back together, which is shown in "Exhibit E." [The gloved fingers appearing in the photographs are my own.]

6. The dissection of the uterus cut through the largest fibroid, and I was able to match the large fibroid with that area in the lower uterine segment by bringing back together the matching cut sides of the fibroid. In folding the uterus at the fundus back down, I was able to orient where the largest fibroid was positioned anatomically before the autopsy. See "Exhibit F." To a reasonable degree of medical probability, that very large fibroid was located anterior and involved the lower uterine segment. "Exhibit G" is a drawing that demonstrates the location of this large fibroid within the uterus.

7. I have reviewed the autopsy report of Sharon Karayianis, M.D., involving Cheryl Newcomb, and a transcript of her testimony taken January 17-18, 1996. According to Dr. Karayianis, there were two large fibroids located in the posterior fundus [back/top] of the uterus. Although I can see a small 4 centimeter fibroid on the posterior wall, I cannot reconcile Dr. Karayianis' autopsy findings with my findings from examining the same uterus in regard to the position of the large fibroid which is in the anterior uterine wall and low in the uterus, extending into the lower uterine segment.

8. At pages 29-30 of Dr. Karayianis' 1/18/96 testimony, Dr. Karayianis was confronted with interpretations of the ultrasounds of Cheryl Newcomb, specifically that the large fibroid was in the lower uterine segment, was anterior, and was covered by the placenta, and she disagreed with any such interpretation based upon what she saw at autopsy. I personally consulted with a colleague here at Johns Hopkins in our obstetrical department, Karin Blakemore, M.D., and we reviewed the ultrasounds of Cheryl Newcomb performed on 4/2/90, 7/25/90, and 7/30/90. Dr. Blakemore was of the opinion that the large fibroid was anterior and low in the uterus, as was the placenta. Although the placenta had been removed from the uterus, and could not be seen on my examination of the uterine specimen, the ultrasounds were consistent with my observations that the very large fibroid was anterior and in the lower uterine segment. There was no large fibroid in the posterior fundus.

FURTHER AFFIANT SAYETH NAUGHT.

S/
Grover MacGregor Hutchins, M.D.

On the 17th day of March, 1997, Grover MacGregor Hutchins, M.D., who (is personally known to me) (produced as identification his Johns Hopkins School of Medicine ID Badge), and took an oath before signing this affidavit before me.

S/ Judy L. Walter
NOTARY PUBLIC

My commission expires: 4/1/99

(2)

No. 06-1319

Supreme Court, U.S.
FILED
MAY 3 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CAROLINE ANNE NEWCOMB, A MINOR, BY AND THROUGH HER NEXT FRIEND AND NATURAL FATHER, THOMAS W. NEWCOMB,

Petitioners,

v.

JAMES R. BAIR, M.D., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arizona, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Arizona Court of Appeals properly affirmed denial of petitioner's motion to vacate judgments under Rule 60(c)(6), Ariz. R. Civ. P., where the minor Petitioner was, at all relevant times, represented by counsel and by her father as guardian.

PARTIES TO THE PROCEEDING

Petitioners are Caroline Anne Newcomb, a minor by and through her next friend and natural father, Thomas W. Newcomb. The Petitioners were Movants in the Superior Court of Arizona, Maricopa County under Rule 60(c)(6), Ariz. R. Civ. P. They were Appellants in the Arizona Court of Appeals, Division One, Department E; and Petitioners for review in the Supreme Court of Arizona.

Respondents participating in this Response are: Scottsdale Medical Imaging, Ltd.; J.K. Crowe, M.D.; Sharon Lynn Karayianis, M.D., Scottsdale Pathology Associates, Ltd., an Arizona corporation. The remaining Respondents, not participating in this Response, are: James R. Bair, M.D.; James R. Bair, M.D., P.C.; Scottsdale Memorial Hospital-Osborn, an Arizona corporation; Scottsdale Memorial Health Services, Co., Inc., an Arizona corporation; Scottsdale Memorial Hospitals, an Arizona corporation; Scottsdale Memorial Health Systems, Inc., an Arizona company; B.E. Medley, M.D.; Jude Finney, M.D., and Healthcare, P.C.

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RULES

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Rule 60(c)(6), Ariz. R. Civ. P. 4, 5, 8, 9

STATEMENT OF THE CASE

A. Essential Facts.

This litigation began more than fourteen years ago. It arises out of the death of Cheryl Newcomb during the birth of her daughter, Caroline, and injuries Caroline sustained upon delivery. Cheryl's husband, Thomas Newcomb, filed a lawsuit in Arizona state court (Maricopa County Superior Court, Cause No. CV 92-22705) on December 31, 1992, on behalf of himself and his minor daughter, Caroline (*"Newcomb I"*). The defendants in *Newcomb I* were Scottsdale Memorial Hospital, now known as Scottsdale Healthcare Corp. ("SMH"), where the delivery occurred, and Dr. James Bair, the obstetrician, and his professional corporation.

Among other things, *Newcomb I* alleged that Dr. Bair should have performed a primary c-section, rather than inducing labor due to Cheryl Newcomb's large uterine fibroid tumors and the risk of placental abruption. The uterine fibroids and the records that reported them were at issue from the commencement of *Newcomb I*. During discovery, petitioners began to contend that SMH and others had fraudulently altered and falsified records to cover up the true cause of Cheryl's death and Caroline's injuries.

In a motion for partial summary judgment filed on April 20, 1995, SMH contended that it was entitled to summary judgment on the fraud allegations because no facts or theories to support a claim of fraud had been disclosed, and there was no evidence of fraud or falsification. That motion also sought an order in limine precluding any argument or comment at trial suggesting falsification or cover up.

Petitioners opposed SMH's motion. Their attorney asserted that he had just learned for the first time (when he received the medical examiner's records from SMH on April 19, 1995) that Cheryl may have had a placenta previa that caused her death and injury to her daughter. As early as May 10, 1995, he also told the trial court that Petitioners "will be filing in the near future a Motion for leave to file an amended complaint to reflect the presence of a placenta previa, to reopen discovery, **and to state a now-appropriate claim for fraud.**" Petitioners also relied on an affidavit from one of their experts, explaining why the recently-discovered evidence suggesting the existence of placenta previa altered his prior opinions.

In a further effort to oppose SMH's motion, Petitioners filed, on June 14, 1995, a supplemental affidavit by their expert. The expert declared that on June 8, 1995, he had looked at the actual ultrasounds for Cheryl Newcomb for the first time, and that they showed a large fibroid tumor and the placenta located in the lower uterine segment. He further declared that he had only recently become aware that a placenta previa had been observed at the time of the c-section and that he had no reason to look at the ultrasounds before that time.

By minute entry dated August 1, 1995, the trial court denied SMH's motion for partial summary judgment and motion in limine related to the issue of fraud. However, the trial court granted summary judgment for SMH on the ground that Petitioners had failed to produce sufficient expert opinion evidence to support their claims.

The claims against Dr. Bair proceeded to trial. However, at the conclusion of Petitioners' evidence, the parties stipulated to the dismissal of claims against Dr. Bair with

prejudice. The trial court later learned that the attorneys for Petitioners at that time had agreed prior to trial with Dr. Bair's attorney to dismiss their claims, but had concealed that agreement from the court.

Petitioners appealed the judgment in favor of SMH in *Newcomb I*. Finding that Petitioners had offered sufficient expert evidence, the appellate court reversed summary judgment and remanded the case against SMH to the trial court.

In the meantime, Petitioners had filed a second lawsuit (Maricopa County Superior Court, Cause No. CV 96-07173) on April 24, 1996 ("*Newcomb II*"). The defendants in *Newcomb II* included SMH and several medical doctors, including Dr. Crowe, Dr. Medley, and Dr. Karayianis. *Newcomb II* included allegations that the defendants had rewritten, altered and otherwise falsified records. Ultimately, the remanded claims against SMH in *Newcomb I* were consolidated with *Newcomb II* on February 5, 1998.

On August 31, 2001, the trial court granted a motion to compel Petitioners to disclose evidence related to their claim that they incurred increased litigation expenses as a result of the alleged fraud, which evidence included documents from their former attorneys' files. Petitioners ignored this order. On January 8, 2002, the trial court issued a second order requiring Petitioners to produce their prior attorneys' files, this time warning that failure to comply by January 22, 2002, would result in dismissal of the case.

Rather than comply with these orders, Petitioners filed a special action appeal with the Arizona Court of Appeals on March 4, 2002. On March 28, 2002, the

appellate court ordered Petitioners to produce their former attorneys' files for *in camera* inspection by the trial court, so that the trial court could determine which documents were relevant to the fraud allegation and order their disclosure. Petitioners never complied with this order either.

In the meantime, on February 1, 2002, the various defendants moved for summary judgment. When Petitioners did not timely respond to these motions, the defendants moved for summary disposition of their pending summary judgment motions.

On March 20, 2002, Petitioners, through their counsel of record, filed untimely responses to just one of the defendants' (Dr. Karayianis') motion for summary judgment and motion for summary disposition. However, they filed no responses to the other pending motions.

On April 10, 2002, the trial court granted the pending summary judgment motions. The trial court entered judgment for Dr. Crowe and Dr. Medley on May 3, 2002, and for SMH and Dr. Karayianis on May 6, 2002. Petitioners, again through counsel of record, appealed these judgments on May 31, 2002, but later abandoned that appeal.

Almost two and a half years later, on November 15, 2004, Petitioners sought relief from these judgments pursuant to Rule 60(c)(6), Ariz. R. Civ. P. Thomas Newcomb admits he learned of the dismissal of his and his daughter's claims in October, 2003; however, Petitioners offered no explanation for waiting more than a year after that discovery to seek relief from the judgment. The trial court denied the motion, and Petitioners appealed to the Arizona Court of Appeals.

B. Proceedings Below.

1. The Arizona Court of Appeals.

After full briefing and oral argument, the Arizona Court of Appeals issued an unpublished decision, affirming the trial court's decision. (A-3 to A-29 of Petitioner's Appendix). That court held that Petitioners were not entitled to relief from the judgment under Rule 60(c)(6), relying on the Arizona Supreme Court's express rejection of the affirmative misconduct rule in *Panzino v. City of Phoenix*, 196 Ariz. 442, 999 P.2d 198 (2000). (A-16 to A-19, ¶¶28-32). It also held that the underlying premise of Petitioners' argument – that they had been abandoned by their counsel and the judgments granting summary judgment had been entered "ex parte" – was false. It specifically noted that Petitioners' counsel of record had filed a special action challenge to the trial court's orders compelling production of their former attorneys' files "[j]ust two weeks before defendants moved for summary judgment," filed a response to one of the defendants' motions for summary judgment and then commenced an appeal after entry of judgment. (A-13, A-14, A-21 to A-23, ¶¶23, 37-39 and n.8).

The Arizona Court of Appeals also rejected the argument that the trial court was required to appoint someone to represent Caroline Newcomb, noting that her father already filled that role as her legal guardian. (A-19 to A-20, ¶¶33-34).

Finally, the Arizona Court of Appeals also rejected Petitioners' fraud-on-the-court argument. (A-24 to A-28, ¶¶41-50). It found that Petitioners' allegations did not constitute "fraud on the court" under Rule 60(c)(6), Ariz. R. Civ. P., because "[t]he fraud alleged does not involve corruption of the judicial process itself, and does not

include bribery or improper influence of the court . . . [and Petitioners] were not prevented from arguing the fraud." Indeed, it noted that Petitioners had repeatedly presented "evidence which they believed showed a fraudulent cover-up by the defendants." (A-25, ¶46).

Petitioners filed a motion for reconsideration with the Arizona Court of Appeals. That motion was denied. (A-33).

2. Arizona Supreme Court.

Petitioners next petitioned for discretionary review with the Arizona Supreme Court. The Arizona Supreme Court denied review. (A-1 to A-2).

REASONS FOR DENYING THE PETITION

Petitioners assert just one argument for granting their petition: the Arizona courts violated the due process rights of a minor, Caroline Newcomb, by not doing something to protect her from abandonment by her counsel. The petition should be denied because: (1) its underlying premise of abandonment by counsel is false; (2) Petitioners' motion for relief from judgment was untimely and therefore could have been properly denied regardless of its merits; and (3) the Petition has no merit because there was no due process violation at all.

I. THE UNDERLYING PREMISE FOR THE PETITION IS FALSE.

The lynchpin of Petitioners' due process argument is that Caroline was abandoned by counsel when motions for summary judgment were filed, and that the resulting

judgments were therefore rendered "ex parte." This is simply false, as both the trial court and the Arizona Court of Appeals recognized, and as the trial court record unambiguously demonstrates.

Petitioners were actively represented by their counsel of record in the days immediately before the summary judgment motions were filed, during the pendency of those motions and even after the resulting judgments were entered. Thus, the Arizona Court of Appeals properly noted:

> [T]he record shows Newcombs' counsel was actively litigating the case at the time the summary judgment motion were filed. Just two weeks before defendants moved for summary judgment, Newcombs had filed a special action challenging the superior court's production ruling and one expert ruling. Newcombs' lawyers pursued the special action and, indeed, won partial relief.

(A-22, ¶37).

As to the motions for summary judgment themselves, the record shows that Petitioners' counsel of record did file a response as to one of the defendants' motions (A-23, ¶39 ("Newcombs' argument that counsel abandoned Daughter is further contradicted by counsel's actions in responding to Karayianis's summary judgment motion and motion for summary dismissal.")). Moreover, the Arizona Court of Appeals correctly observed:

> Why counsel failed to respond to all but one of the summary judgment motions remains a mystery. . . .

> . . . Since counsel had not abandon Daughter on these matters, the superior court might have believed Newcombs' failure to respond to the summary judgment motions [of the other defendants] was tactical, perhaps because they did not have a meritorious response or because the court's production ruling required them to produce documents containing information injurious to their case.

(A-22, ¶¶38-39).

Even after entry of judgment against them, Petitioners continued to be represented by their counsel of record. Their counsel filed a timely notice of appeal. But, for reasons also unexplained, they did nothing further to pursue the appeal. (A-14, ¶23).

Thus, contrary to Petitioners' false assertion to this Court:

> The reality is that Newcombs received actual representation throughout the case, but, for reasons not explained, received grossly deficient legal representation at the very end of the case. But grossly legal representation does not entitle a party to Rule 60(c)(6) relief in Arizona.

(A-22, ¶38). Nor does merely deficient legal representation in this civil action constitute a due process violation. Instead, as the Arizona Supreme Court taught in *Panzino v. City of Phoenix*, 196 Ariz. 442, 447 ¶ 17, 999 P.2d 198, 203 (2000), "[Caroline's] right of action now lies against her former attorney, not against the original defendants."

II. PETITIONERS' RULE 60(c)(6) MOTION WAS UNTIMELY AND COULD HAVE BEEN DENIED ON THAT BASIS.

Petitioners' motion for relief from judgment was required to be filed "within a reasonable time." Rule 60(c), Ariz. R. Civ. P. The final judgments from which Petitioners seek relief were entered in May, 2002. Petitioner did not file their Rule 60(c)(6) motion until November 15, 2004 – two and a half years later. Yet, the only explanation Petitioners offered for this delay is that Petitioners did not learn that the trial court had dismissed the entire lawsuit until October 2003, when Thomas Newcomb admittedly learned of the dismissal. However, Petitioners offered no explanation whatsoever for waiting to seek relief from the judgment for an additional thirteen months.

Under Arizona law with respect to Rule 60(c) motions, "the moving party is 'required to show good reason for his failure to take appropriate action sooner' and should offer 'some explanation of the delay in seeking relief.'" *Hilgeman v. American Mortgage Securities, Inc.*, 196 Ariz. 215, 220 ¶ 16, 994 P.2d 1030, 1035 (Ariz. Ct. App. 2000) (quoting *Marquez v. Rapid Harvest Co.*, 99 Ariz. 363, 365-66, 409 P.2d 285, 287-88 (1965)). Thus, Petitioners' failure to offer any explanation for not seeking relief sooner than thirteen months after they learned of the dismissal is, in itself, sufficient justification for the trial court's denial of the motion.

The Arizona courts did not decide the timeliness issue because Petitioners' motion so clearly did not fit within the parameters of Rule 60(c) on the merits. However, given this additional procedural defect, this Court's review of the merits is unwarranted.

III. THE DENIAL OF PETITIONERS' RULE 60(c) MOTION WAS NOT A DUE PROCESS VIOLATION.

Petitioners contend that the trial court violated Caroline Newcomb's due process rights by not doing something to ensure she had "actual representation." (Petition at 14). Their argument finds no support in either Arizona law or this Court's established due process principles.

Under Arizona law, "a minor is never allowed to bring an action in his own name but must always sue through a representative whatever the cause of action." *Porter v. Triad of Arizona*, 203 Ariz. 230, 233 ¶ 11, 52 P.3d 799, 802 (Ariz. Ct. App. 2002). Thus, the rules of civil procedure provide that when "an infant . . . has a representative, such as a general guardian, or similar fiduciary, the representative may sue or defend on behalf of the infant." Rule 17(g), Ariz. R. Civ. P. If the infant does not have such a representative, "[t]he court shall appoint a guardian ad litem . . . or shall make such other order as it deems proper for the protection of the infant." *Id.*; *see also Montano v. Browning*, 202 Ariz. 544, 547 ¶ 9, 48 P.3d 494, 497 (Ariz. Ct. App. 2002).

Furthermore, like most other jurisdictions, Arizona Courts hold "that a non-attorney parent or like fiduciary must be represented by an attorney to maintain a lawsuit on behalf of a child or incompetent person." *Byers-Watts v. Parker*, 199 Ariz. 466, 470 ¶ 17, 18 P.3d 1265, 1269 (Ariz. Ct. App. 2001). Indeed, Arizona has adopted the federal courts' conclusions and rationales that a trial court has a *sua sponte* duty to ensure a minor is represented by a lawyer because "the infant is always the ward of every court wherein his rights or property are brought into jeopardy." *Id.* at 470 ¶¶ 15, 18, 18 P.3d at 1269 (quoting *Wenger v. Canastota Central School District*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999)).

In this case, the minor Petitioner, Caroline Newcomb, enjoyed both of these levels of protection. First, she was not asserting her claims directly. Instead, her claims were brought on her behalf through her father/guardian, Thomas Newcomb. Second, Thomas Newcomb was not attempting to represent himself and Caroline *pro se*. Instead, he had retained attorneys of his choosing to pursue both his and Caroline's claims.

Although Petitioners contend that the trial court had a duty to do something more to ensure that the minor had "actual representation," they do not define what they mean by "actual" representation. As discussed above, their attorneys of record affirmatively took steps to represent Petitioners immediately before and after the motions for summary judgment were filed. Thus, as a matter of actual fact, Caroline Newcomb was being represented by legal counsel throughout the entirety of the lengthy litigation.

Keeping this in mind, Petitioners' contention that the trial court had a duty to ensure "actual representation" apparently means a duty to monitor and evaluate the performance of counsel of record and *sua sponte* take action when counsel of record fall below "acceptable" standards – whatever that might mean. However, Petitioners cite no Arizona authority in support of such a duty, and, indeed, no such authority exists.

Similarly, Petitioners cite no federal authority for the notion that a minor's right to due process includes the right to reports from trial court judges about the quality of the minor's legal representation. Again, no such authority exists.

The decisions of this Court on which Petitioners rely merely state the familiar standard that the Due Process

Clause of the Fourteenth Amendment requires "notice and opportunity for hearing appropriate to the nature of the case." *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 1712 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L.Ed. 865 (1950)). Petitioners cite no case that holds (or even hints) that a trial court in civil litigation must go over the heads of a minors' attorneys and verify directly with the minors' guardians that they are aware of, and in agreement with, the attorneys' actions. The Due Process Clause does not mandate such action.

Accordingly, because Caroline Newcomb's claims were asserted in the trial court by her father/guardian and she was represented by counsel retained by her father, she enjoyed the full measure of due process to which she was entitled. Consequently, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons discussed above, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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